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ABSTRACT

This issue of Inequality in Education deviates from the usual format of in-depth discussion of a particular topic to include reports on a variety of significant issues in education-law. Leon Hall summarizes the numerous experiences he has had with Southern desegregated schools and students and relates his conclusions about how desegregation is actually proceeding in the South. In "Remedying Failure to Teach Basic Skills," Gershon M. Ratner offers some preliminary thoughts on ways legal services attorneys might address the problems of the large percentage of children who are not taught adequately to read and write. R. Stephen Browning and Jack Costello, Jr. follow the progress of Title I of the 1965 Elementary Secondary Education Act from its inception to the present in their analysis of how and why federal funds designated for poor and disadvantaged students continue to be illegally allocated and illegally spent. "The Equally Good Off, The Equally Bad Off," by Thomas J. Cottle reveals the effects of economic and educational tracking on two young students from different backgrounds. Finally, Theodore E. Lauer depicts the lack of "Education for Institutionalized Children" and discusses the necessary examination of the incarceration process which must precede any improvement in the education offered to juvenile offenders. (Author/JM)

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Introduction

This issue of *Inequality in Education* deviates from our usual format of in-depth discussion of a particular topic to include reports on a variety of significant issues in education-law. It is hoped that the "samplings" will stimulate greater thought and focus attention on these often overlooked critical education matters.

Leon Hall summarizes the numerous experiences he has had with Southern desegregated schools and students and relates his conclusions about how desegregation is actually proceeding in the South. In "Remedying Failure to Teach Basic Skills," Gershon M. Ratner offers some preliminary thoughts on ways legal services attorneys might address the problems of the large percentage of children who are not taught adequately to read and write. R. Stephen Browning and Jack Costello, Jr. follow the progress of Title I of ESEA from its inception to the present in their analysis of how and why federal funds designated for poor and disadvantaged students continue to be illegally allocated and illegally spent.

"The Equally Good Off, The Equally Bad Off" by Thomas J. Cottle reveals the effects of economic and educational tracking on two young students from different backgrounds. Finally, Theodore E. Lauer depicts the lack of "Education for Institutionalized Children" and discusses the necessary examination of the incarceration process which must precede any improvement in the education offered to juvenile offenders.

SCHOOL DESEGREGATION:

A (HOLLOW?) VICTORY

SOME REFLECTIONS

by Leon Hall

> In the long run, our aim is not a society composed of people who are alike but one which recognizes the individuality of each man and permits him without penalties to express the difference of his personality and his heritage in his own way. Properly speaking, therefore, not integration but equality is our genuine objective.[1]

From my standpoint today, I am convinced Blacks and decent white Southerners are ious in their twenty year struggle to deseg- public elementary and secondary education. re the holders of a victory that parallels the victory in the Civil War. And I think the ons of many present Southerners in regard to the war of school desegregation are identical ose of their forefathers upon losing the Civil

Though they clearly had lost the Civil War, Confederates continued their fight. When ar of guns and bullets was over, the South hed an active and psychological war through ment of Ku Klux Klan terrorism and Jim Laws; to this day many Southerners hold an ng belief that they will "win." But, for all its legacy, the South has been pushed harder arther than any other region of this country d dealing with what is perhaps the greatest problem America has faced. As enunciated by Fredrick Douglass in 1881 and echoed twenty years later by W.E.B. DuBois: "The problem of the 20th Century is the problem of the color-line."[2]

Central to the South's response has been an attitude once expressed to me by a white Georgia farmer: "We will move as slow as possible," he said, "and as fast as necessary." This attitude in general is deplorable enough, but when it is held by persons in control of public institutions, it is sure to breed tragic consequences.

Beginning with the *Brown* v. *Board of Education*[3] decision in 1954 and continuing through countless other major court decisions, the legal victors have been the plaintiffs, Black parents and children throughout the South. The major efforts to both block and implement the *Brown* decision for the past twenty years have been in the South where school desegregation was *de jure*.

Brown stated that schools should desegregate "with all deliberate speed," but allowed for limited delays if a school board could "[e]stablish that such time is necessary in the public interest."[4] School officials who opposed desegregation seized upon the language of the court and for some time were quite effective in delaying the desegregation process. Many refused to develop desegregation plans at all; those who did respond with "plans" tried to show why the schools could not be desegregated.

In 1964 the Supreme Court served notice, in *Griffin* v. *County School Board of Prince Edward County, Virginia*, that such delays were no longer acceptable: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education

Leon Hall is Director of the School Desegre- Project, Southern Regional Council. This is based on a speech delivered at "The ren of the South: School Desegregation and ignificance," a symposium held at the Univer- f Virginia, Charlottesville in cooperation with April 1974.

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equal to that afforded by the public schools in the other parts of Virginia."[5]

Four years later, the Court ordered that desegregation take place immediately. It stated in *Green v. County School Board of New Kent County, Virginia*: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[6]

In October 1969, the Supreme Court again held that the constitutional right to a desegregated education could no longer be delayed. In *Alexander v. Holmes County, Mississippi Board of Education* it held: "The obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[7] The late Justice Hugo Black stated his own impatience in precise terms:

> It has been fifteen years since we declared in the two *Brown* cases that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either "white" or "Negro" and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute.[8]

The language of these Supreme Court rulings speaks to the semantic tenacity shown by school officials to avoid desegregation. Each and every Court order has been meticulously picked apart as school authorities have sought to avoid desegregating. Their most appreciable result has been to delay the inevitable.

The legal offensives carried out thus far by advocates of equality of educational opportunity in elementary and secondary education have been designed to end segregated schools. But to this point all rulings by the Supreme Court have fallen short. They have been interpreted to deal only with mixing bodies in the powerless school community composed of faculty and students. The immense power of the superintendent and his

TABLE 1

EMPLOYMENT AND DOLLAR LOSS FOR BLACK EDUCATORS IN SEVENTEEN SOUTHERN AND BORDER STATES[a]

STATE	Total Pupils 1970	Total Teachers 1970	Pupil Teacher Ratio	Number of Black Students	Expected Number of Black Teachers Under Singleton Degree Based On Pupil Teacher Ratio	Actual Number of Black Teachers 1970	Per Cent Difference	Number of Black Teachers Displaced by Discriminatory Hiring and Dismissals	Average Teacher Salary 1970	Cost Black Communities in Dollars 1970
Alabama	780,286	31,279	25	268,593	10,744	9,452	12	1,292	6,954	8,984,568
Arkansas	368,035	15,299	25	107,213	4,289	3,121	27	1,168	6,445	7,527,760
Delaware	128,735	5,570	23	26,438	1,149	804	30	345	9,300	3,208,500
Florida	1,436,487	59,648	24	332,121	13,838	11,340	18	2,498	8,600	25,482,800
Georgia	1,099,446	43,818	25	364,868	14,595	12,236	16	2,359	7,372	17,390,548
Kentucky	654,711	26,672	25	61,473	2,459	1,287	47	1,172	7,624	8,935,328
Louisiana	841,656	35,184	24	340,447	14,188	12,145	14	2,040	7,220	14,728,800
Maryland	911,618	37,344	25	220,166	8,807	7,252	17	1,555	9,885	15,371,175
Mississippi	533,289	22,301	24	271,932	11,331	9,163	19	2,168	6,012	13,034,016
Missouri	857,890	35,607	24	141,005	5,875	3,645	37	2,230	8,091	18,042,930
N. Carolina	1,187,048	47,221	25	351,182	14,047	10,996	21	3,051	7,744	23,626,944
Oklahoma	455,754	18,656	24	47,720	1,988	1,400	29	588	7,139	4,197,732
S. Carolina	640,148	25,746	25	262,974	10,519	8,482	19	2,037	7,000	14,259,000
Tennessee	877,778	33,625	26	188,754	7,260	5,724	21	1,536	7,290	11,197,440
Texas	2,468,283	105,186	23	398,187	17,312	12,672	26	4,640	7,503	34,813,920
Virginia	1,067,292	45,489	23	258,280	11,230	8,498	24	2,732	8,200	22,402,400
W. Virginia	392,690	16,223	24	18,972	791	618	21	173	7,850	1,358,050
TOTALS	14,701,036	604,868	N.A.	3,660,322	150,419	118,835		31,584		244,561,911

[a] *The Urban Review*, vol. 6, no. 3, 1973, p. 8. Reprinted with the permission of APS Publications.

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fice to maintain the *status quo* have been touched.

These rulings have also fallen short in that ey primarily address questions of the what, why d (since 1964) when of desegregation, while ry rarely addressing the *how*. They all stop at e school house door, even though experience aches us that policies decided at the top deter- ne to a great extent the degree of desegregation at will actually occur within a given school trict. The greatest obstacle to desegregation is at the resistors are now, and have been for some ne, the implementors. The majority of imple- ntors are still resisting the dictates of the law, nuinely embodying the Georgia farmer's philos- hy of moving as fast as necessary and as slow as ssible! Although not all school authorities are ite, the overwhelming majority are. In 1974 of proximately 17,500 school board members in e eleven Southern states, 325 were Black,[9] of 1,558 school superintendents in the ten tes,[10] 13 were Black.[11]

A report published in *The Urban Review* ted, "School policies relative to desegregation t various southern school districts have adopted deliberate in their intent: the annihilation of ack educational leadership in those dis- cts. . . .Between 1954 and 1970, in seventeen uthern and border states, the Black student pulation increased from twenty-three percent of total to twenty-five percent; the Black teach- force, by contrast, decreased from twenty-one cent of the total to nineteen percent."[12]

Desegregation and Displacement

The problem of the displaced Black educator one that has exacted a heavy toll in the ranks of ack principals (as illustrated in Tables 2 and 3) o have long been symbols of attainment, thority and respect in Southern Black commu- ies. Though these charts are based on statistics m Alabama, this situation in varying degrees olies Southwide.

There are also sensitive superintendents ced out of public education. Many of these ople decided to live up to the law, and the law s that schools must desegregate. In a medium- ed city in Georgia, a white superintendent not own for past liberalism decided to follow the rts' directions. He drew up a desegregation plan, proposed it and was fired by the school board.

Black students are also falling victim to the continuing resistance to desegregation. We are witnessing a phenomenon within the student community of the region which the Southern Regional Council (SRC) and others have come to call "the student push-out." A student who has been "pushed-out" is one who has been expelled or suspended from school under questionable circumstances or who, because of intolerable hostility directed against him or her, finally quits school.[13] Two of the chief methods of displacing students are suspension and expulsion.

Suspensions and expulsions in the state of Florida are illustrative of the magnitude of the

TABLE 2 PRINCIPALS HIRED IN ALABAMA DURING 1966–1970, By Race[a]

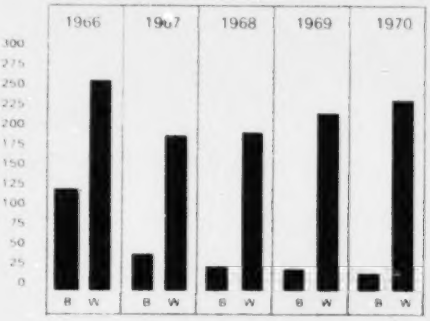
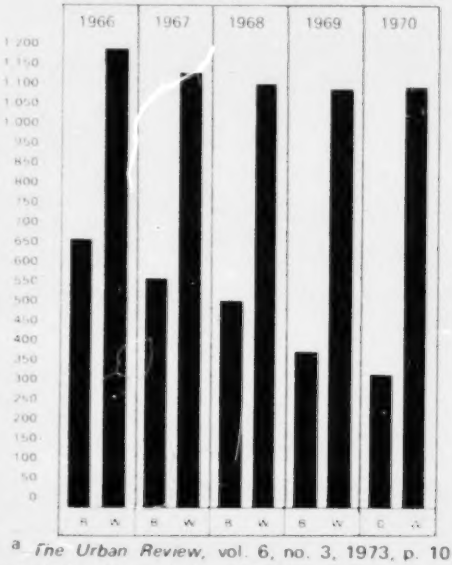


TABLE 3 RELATIVE DECREASE OF PRINCIPALS IN ALABAMA ACCORDING TO RACE 1966–1970[a]



[a] *The Urban Review*, vol. 6, no. 3, 1973, p. 10. Reprinted with the permission of APS Publications.

Table 4
School Discipline: Blacks and Whites[a]
1972–73

	% Black Students Enrolled	% Black Students of Those Suspended and Expelled	Number Suspended and Expelled, Both Races
Brevard	11	22	3,416
Broward*	23	50	4,120
Collier*	11	48	163
Dade	25	53	6,947
Indian River	29	50	432
Lez	18	44	1,794
Martin*	25	41	490
Monroe	12	29	463
Palm Beach	27	59	2,708
St. Lucia	45	72	1,490

* No reported expulsions.
Source: District superintendents' reports to U.S. Department of HEW, 1973. In some cases, numbers may be estimates.

[a] "School Discipline Hits Blacks Hardest," Tom Morganthau, *Miami Herald*, Feb. 3, 1974.

(push-out) problem throughout the South. "Black students last year were suspended and expelled from Florida schools at a rate two and a half times higher than the rate for whites," according to a report of the Governor's Task Force on Disrupted Youth.[14] And the *Miami Herald* reports that, "in seven of ten South Florida counties, blacks were ejected from school at an even higher rate—as much as four times the rate for white students."[15]

Statewide, 80,023 students were suspended and expelled during the 1972–73 school year according to an annual desegregation survey required by the U.S. Department of Health, Education and Welfare's Office of Civil Rights. Of the 80,023 suspended, 35,037 (forty-five percent) were Black, although Blacks only comprised twenty-three percent of the state's public school enrollment last year. On a per-capita basis (*i.e.*, compared to the number of students of each race enrolled in Florida schools in 1972–73), Blacks were about two and a half times more likely than whites to be suspended and nearly three times more likely to be expelled.[16]

The statistics on school suspensions, collected for the first time this year as part of the HEW survey, are fifty-seven percent higher than the total predicted last fall by Governor Reubin Askew's education adviser, Dr. Claud Anderson. In testimony before a legislative subcommittee in November, Anderson said he thought suspensions of students of both races totaled 50,000 a year. More recently he stated that the HEW figures show "the problem is even bigger than we expected" and added that still other suspensions not reported by school officials might double the official figures.[17]

Harassment of Black Students

A few examples illustrate the continuing harassment of Black students. A Black student leader attending a desegregated high school in Wilcox County, Alabama was suspended without a hearing for his participation in a politically-active student action group. A Black youth was suspended from his Arkansas high school for four months for fighting in school. His white opponent was suspended for seven days.

In a Mississippi school, a Black sophomore was expelled because he fled the campus during a series of racial fights. When he attempted to reenter school that same day to complete an assignment, he was confronted by the principal who accused him of trespassing. The student was arrested, spent three days in jail and was not allowed to return to school. His trial has been postponed twice.[18]

Another Black student, now in college, says that when her high school was desegregated the active Black student leaders were placed on a "Black List," that white school administrators continually harassed Black students, and that many Blacks were suspended or expelled for chewing gum in class, for suspected fighting, for supposed insubordination and other evidence of "inappropriate behavior."

Actual statistics on (Black) student push-outs are difficult to uncover, but suspension, expulsion and dropout figures suggest the dimensions of the disproportionate number of Blacks who, for whatever reason, are leaving school.

St. Petersburg, Florida experienced a rise of suspensions from 3,500 in 1968–69 to 8,200 in 1970–71. Although only sixteen percent of the St. Petersburg enrollment is Black, about one half of the suspensions were of Black students. Other Southern school systems exemplify similar suspension statistics as shown in Table 5.

Based upon my examination of how the majority of school officials have carried out court ordered desegregation, I am thoroughly convinced that they have resorted to an unwritten–an unspoken–tactic that is quite ominous in its application. It is clear that most school systems have chosen the most disruptive, damaging, round-about and complex processes and approaches for Black children and Black educators. They have decided to handle desegregation in a way that makes the price Black communities must pay so very high that Black citizens themselves will of necessity stop pushing for desegregation and ask: Is it worth it? Many Black parents are forced to raise this question when they look into the eyes of their children, eyes that once held gaiety, spontaneity and joy and that now show sadness, frustration and anger. Is it worth sending children to encounter teachers who don't respect their personhood? Is it worth having children tested in a way that labels them slow learners or educable mentally retarded or uneducable? Is it worth exposing delicate young minds to persons who think they are members of a race that has basically weak family structure as asserted by Daniel P. Moynihan? Is it worth exposing masses of young Black people to those who believe that Black people are inferior based on their genes as asserted by the Schockleys and Jensens? Is it worth sending Black children to schools where the authorities disproportionately dismiss them, push them out and justify their actions with insinuations and blatant statements that Black children are not accustomed to discipline? Is it worth it to send children and teachers to schools in a system that has almost completely eliminated any vestiges of Black schools while retaining most white educators, facilities, symbols and conveniences?

The Enigma of Resegregation

Recognizing that total desegregation is and has been the single most promising avenue to equal educational opportunity, Randolph Blackwell has

Table 5[a]

Year	School System	Total Suspensions	% Black
1972–73	Miami, Florida	12,000	71%
1972–73	Broward Cty., Florida	7,288	43%
1972–73	Richland Cty., S.C.	1,964	77%
1971–72	Dallas, Texas	12,000	45%
1971–72	Charlotte–Mecklenburg Cty., N.C.	6,021	90%
1970–71	Tampa, Florida	2,697	50%

[a] *The Student Push-Out*, The Southern Regional Council, 1973

pinpointed the situation in which I think we advocates for desegregation find ourselves:

> We have waged nearly a twenty year fight to desegregate the schools and now you hear people advocating segregated education. Some of the people you would expect to advocate integrated schools are saying the strangest things in support of segregating the schools. Black folk talking about segregating the schools after having spent more than twenty very deliberate years, bringing to bear the best minds that this nation has, in order to structure the direction of desegregating schools. Black folk talking about the psychological damage that black kids are suffering as a result of integrated education—the loss of identity, the loss of purpose; all sorts of funny things on the heels of having spent twenty years trying to set this thing in the right direction. It really does sound funny to a person like me, who eighteen or twenty years ago, sat in discussions and heard the best minds in this country arguing about the psychological damage that was being done to black kids and white kids by segregated education. We have gone full cycle, because the *Brown* case, to a very great extent, turned not on a legal argument so much as it did on a social-psychological argument. We argued with the court that there was no such thing as equal education if it was segregated. We argued that there was a kind of social, psychological damage that black kids and white kids sustained and would always sustain if the schools remained segregated. We finally got people to believe that argument. And now, in 1972, I am hearing folk talk about the psychological damage that people suffer from integrated education. . . .What we need to do is stop long enough to look at where we were on sound ground, because we are becoming awfully confused as to what makes a healthy society.[19]

It is true that *some Black* children and *some white* children *are* suffering psychological damage in public schools, although the simple presence of Black and white children and educators within the same environment does not cause emotional damage to children or adults. If the authority figures within that setting perceive Black educators and students as outsiders (to be contained, gotten rid of and taught a lesson), then the potential for Blacks to be genuine victims of psychological damage is certainly present. But if one assumes that merely being within the same facilities with white people causes Black students psychological damage, it is the equivalent of assuming that by co-existing in the same society with white people, Black people will naturally suffer psychologically.

Any damage is not caused by desegregation or integration themselves but by the way desegregation is carried out in most school systems (firing of Black educators, closing of Black schools, demotion of Blacks, etc.) and by the hostile and negative atmosphere that has usually accompanied mass school desegregation. This point was supported by several Civil Rights Commission reports in 1972 on school desegregation in fourteen communities. The Commission found that the process of desegregation is almost never a smooth one. Mistakes frequently are made; petty incidents can throw an anxious community into confusion, and school systems that seem to have turned the corner toward success suffer serious setbacks. Above all, the Commission found that successful school desegregation is not achieved without substantial effort by many groups and individuals: the school board, the superintendent, the teachers, the news media, civic leaders and students themselves.[20]

The Increasing Victory Inside Schools

I have traveled throughout the South listening to students, offering advice and advocating that they be treated with respect; urging school authorities to involve students in meaningful ways within school decision-making processes; attempting to assist students as they seek to pinpoint the sources of their problems; urging them to realize that their problems are not problems of race and are not caused by other students. The problems are in many cases endemic of the system and the schools they attend. I have encountered a set of dynamics further convincing me that de-

gregation is a victory for decency and that esegregation offers great promise for future generations.

These dynamics are the attitudes and actions a growing number of students in desegregated hools. Here in their words are a few illustrations what increasingly represents the majority view students. From a white junior in South Carolina:

> It is obvious that most school administrations do not listen to the students. If school officials would begin to listen they would find much helpful information. The administration would know that a majority of the students (64% black and 54% white)[19] are in favor of integration and want more interracial projects and activities that would produce better relations among the students. From the administration's standpoint this would be extremely rewarding. These projects and activities could foster better communications and relations among students, thus lessening the chances of racial conflict. But unfortunately most school administrations have remained quiet.[21]

Black high school senior in Charlotte, North rolina:

> I believe integration has to work...if the parents and adults would stay out of it and let the kids work it out. It's the only way to advance. How are we going to change? Through education in the white man's way, the power lies in his hands. We have no power but the few jobs they throw Blacks. I want the best and the best is not in Black schools.[22]

Black student in Greenville, South Carolina:

> The older people is the problem. I think if they just let the younger people run schools it would be better. I had a letter from South Dakota University and the students there feel the same way I do. If the younger people ran the schools we could get along, but as long as the older people are running them and standing in our way, it will never change our world completely; we will always feel prejudice about each other....If the young people could run the schools there would be no prejudice and no dropouts. One reason the students are dropping out is because of the establishment, which is square.[23]

A white student in South Carolina:

> There's a lot to criticize about integration, but it has a lot of good points. The two races should be living together and finding out a lot about each other. In the school I go to, there are a lot of Black officials in school government and they have a lot of white support. Integration can...work out real good.[24]

A white student in Columbia, South Carolina:

> There is a long way to go in integration and a lot of impending dangers beset the schools' path. But it also has its assets. Most students want integration to work and are trying to be a part of an effective unitary school system. Of course, there are those students who want integration to fail and they must be dealt with. The ultimate goal of integration, I believe, is to have all students attending school in peaceful co-existence. "Peace," Martin Luther King once wrote, "is not merely the absence of tension but the presence of brotherhood." Schools in the South are a few years away from brotherhood. But as long as students continue to dedicate themselves to making the unitary school system work, there will be hope for a future of dignity and respect for all ...in America.[25]

The principal of an elementary school located in a predominantly Black section of Pontiac, Michigan related how he encountered an "unexpected wrinkle" in the busing program there. After the busing program had been in effect for about a week, the white students started to "flow out into the community" when they alighted from the buses at school in the morning. The students would go to the homes of their new Black classmates in the area and walk back to school with them. Some of the Black students decided to "reciprocate" and insisted on riding home with

their white friends in the afternoon and then catching a late school bus back to their own community. Although the children were admonished, some continued the practice and the principal and his staff "finally surrendered to the power of friendship."[26]

A 1970 SRC report describes a press conference called by Black and white high school students in Charlotte, N.C. to ask the media, the school board and the superintendent to "leave them alone" and stop distorting trivial incidents and blowing them out of proportion. They said that they were getting along fine. One community leader expressed his conviction that most students in Charlotte "can get along and want to move ahead!"[27]

We at SRC regularly read and hear of students who are members of a race which represents a minority in their particular school being elected or appointed by fellow students as head of the cheering squad, queen of the school, president of their class, homeroom president and president of the student council.

I have also observed simultaneously what I describe as a heightened militancy on the part of students. This militancy is shown most clearly by white students in the area of student rights. And on the part of Black students, it has been manifested most clearly in a "no nonsense," "take no stuff" attitude. Though many of the issues and problems faced by students affect both Black and white, the very nature of the Black existence in the South, in America, makes Black students' concerns and problems broader and possibly deeper than those of white young people. For this reason I will concentrate on the "take no stuff" attitude of Black students.

The "New" Militancy

When I came to the Southern Regional Council in the fall of 1970 (the year of massive school desegregation), the Council and others were quite aware of wide scale student disruption within public schools, primarily secondary schools. There were daily reports of fist fights, demonstrations, jailings, boycotts, schools closing to cool off, sit-ins, etc., involving substantial numbers of students. In fact I was hired to develop and implement a program to work directly with students—to go into the eye of the storm—the secondary student community. Early in our efforts certain aspects of the problem became clear:

1. In many cases Black students held grievances that, in my estimation, were quite valid and they were sincere in their efforts to resolve them: not being al-

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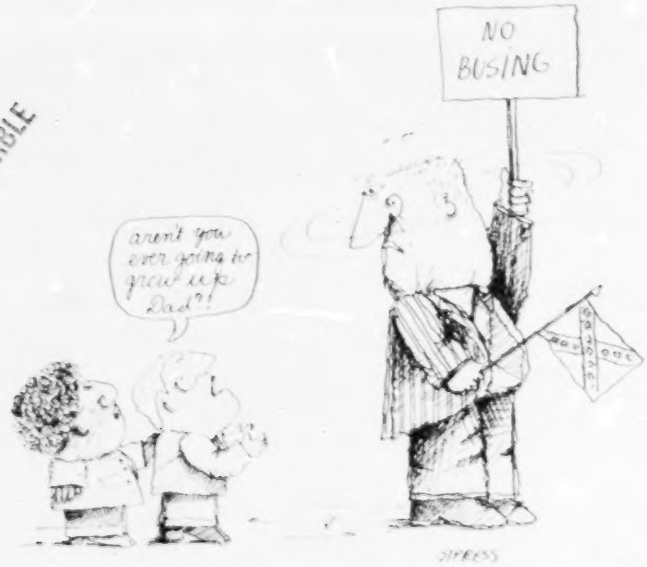

Cartoon by David Sipress

lowed to participate in extra-curricular activities; not being allowed to observe Dr. Martin Luther King's birthday; not being allowed to wear afro hair styles; suffering from dual disciplinary standards; being segregated within desegregated schools; not being permitted to have a Black history week; and an endless list of very basic grievances.

Most school officials were ill-equipped to handle many of the problems desegregation presented, particularly human problems; and many were unwilling to listen to students and/or others who were supportive of public schools and desegregation.

Most schools under the strain of disruptions had severe inner-school communications problems: principal/teacher, teacher/teacher, teacher/student, principal/student, student/student. Communication across "the color line" was almost nil, but communication within the Black student community was a bit more solid and fluid.

Many Black students arrived at their desegregated school aware of the potential for trouble, fully determined not to be mistreated ("messed over") and somewhat prepared to react against real or perceived injustices.

There was very little awareness of or attention given to the potentials of students in assisting the process of desegregation.

A nucleus of Black students in most communities kept in contact with local adults who advised and counseled them about the problems they encountered in school.

flecting on the Civil Rights Movement of the 50's and 60's, I have realized that this militancy is not new, but is to a great extent a continuation of the Movement. Coming this close to equal educational opportunity necessitated a great deal of direct mass action in which Black students were overwhelmingly the "shock troops:" marching in the streets, sitting in, going to jail, picketing, etc. (I was one of them!)

In desegregating the public schools, an increasing amount of the burden of the struggle for equality in education is shifting into the hands of the students. It appears to me that society has asked—has forced—public schools to do what society itself is not yet prepared to do: Desegregate. Black and decent white Americans (primarily through direct action, the courts and the federal government) have pushed the schools farther and more consistently on race issues than any other institution in this country. But now the courts and the government are becoming more and more of an obstacle than an asset. (In fact, a successful suit has been filed against HEW requiring the agency to resume its responsibility for securing compliance with the law.[28]) America has conveniently placed responsibility for implementing school desegregation on educators and on students.

Charles E. Silberman states the situation this way:

> What we are discovering, in short, is that the United States—all of it, North as well as South, West as well as East—is a racist society in a sense and to a degree that we have refused so far to admit, much less face. . . . The tragedy of race relations in the United States is that there is no American dilemma. White Americans are not torn and tortured by the conflict between devotion to the American creed and their actual behavior. They are upset by the current state of race relations, to be sure. But what troubles them is that their peace is being shattered and their business interrupted.[29]

The (false) issue of busing ("It's not the buses . . . it's the Niggers"), the misuse of testing, tracking, ability grouping, private segregated academies, etc., all represent forms of the continuing resistance to desegregation. America is persistently unwilling to afford all children an equal education

as it persistently fails to provide equal opportunity to all citizens. This poses a real possibility of hollowing out a long-fought-for victory by advocates of equality in education.

And yet with all of the setbacks and despair, we are victorious in that Black and white students seem to be hewing out of their interactions an appreciation and respect for each other's worth and dignity and are judging each other not by skin color but by the content of their characters. We are victorious when Black students continue to hold a burning fire within their souls and a willingness to struggle for freedom. We are victorious in that we have eliminated most of the legal barriers to still another of our rights. We are victorious in that we have but one more major barrier to an equal educational opportunity: the administrative implementors who are also the resistors. This barrier, however, is no longer insurmountable because most school boards and many superintendents are elected, and we now have the vote. We are victorious in that we have traveled farther down the road to equal opportunity in elementary and secondary education than in any other area except perhaps voting rights. As we continue to pursue equality in housing, in employment, in health, in the administration of justice, we can benefit from the experiences gained on this near completed journey.

Footnotes

1. Oscar Handlin, *Fire Bell in the Night: The Crisis in Civil Rights*, Beacon Press, 1964.

2. *Great Lives Observed*, "Frederick Douglass' Biography," Benjamin Quarles, ed., Prentice Hall, 1968.

3. *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. *What the Supreme Court Has Said About School Desegregation*, Leadership Conference on Civil Rights, Project One Nation, The Washington Research Project, Washington, D.C., 1972.

5. *Griffin v. County School Board of Prince Edward County, Virginia*, 84 S. Ct. 1226 (1964).

6. *Green v. County School Board of New Kent County, Virginia*, 88 S. Ct. 1689 (1968).

7. *Alexander v. Holmes County, Mississippi Board of Education*, 90 S. Ct. 29 (1969). *See* also, *What the Supreme Court Has Said About School Desegregation*, note 4.

8. Justice Hugo Black, *Alexander v. Holmes County*, note 7, 90 S. Ct. at 17.

9. Source for total number of school board members: National School Board Association and each state Office of Public Instruction. Source for total number of Black school board members in the South: The Vote: Education Project, Atlanta, February 27, 1974.

10. The state of Texas has 1053 superintendents. At the time of this writing, the figures were not available by race.

11. Source for the total number of Black superintendents in ten states and for the total number of school superintendents in eleven states: The state Office of Education in each state.

12. "For Black Educators: Integration Brings the Axe," John W. Smith and Betty M. Smith, *The Urban Review*, vol. 6, no. 3, 1973.

13. *The Student Push-Out: Victim of Continued Resistance to Desegregaion*, The Southern Regional Council and The Robert F. Kennedy Memorial, 1973.

14. *Governor's Task Force on Disrupted Youth*, Phase I Report, Sept. 14, 1973.

15. "School Discipline Hits Blacks Hardest," Tom Morganthau, *Miami Herald*, February 3, 1974.

16. Though suspensions and expulsions in Florida are high, the reason the data is available is that Florida school officials are sensitive to the problem and are attempting to pinpoint causes for remedial purposes.

17. Tom Morganthau, note 15.

18. *Ibid.* *See* also note 12.

19. "Perspective on the *Brown* Decision," Randolph T. Blackwell, *New South*, vol. 28, no. 1, winter 1973.

20. *The Diminishing Barrier: A Report on School Desegregation in Nine Communities*, the U.S. Commission on Civil Rights, Washington, D.C., winter/spring 1972; *School Desegregation in Ten Communities*, the U.S. Commission on Civil Rights, Washington, D.C., June 1973.

21. "School Desegregation: A Student View," Richard Gergel, *New South*, vol. 26, no. 1, winter 1971.

22. *Voices from the South: Black Students Talk About Their Experiences in Desegregated Schools*, a special report of the Southern Regional Council, Betsy Fancher, August 1970.

23. *Ibid.*

24. *Ibid.*

25. *See* note 21.

26. *See* note 20.

27. *The South and Her Children: School Desegregation 1970-71*, a special report of the Southern Regional Council, March 1971.

28. *Adams v. Richardson*, 480 F. 2d 1159 (D.C. Cir., 1973).

29. Charles E. Silberman, *Crisis in Black and White*, Random House, 1964.

REMEDYING FAILURE TO TEACH BASIC SKILLS: Preliminary Thoughts

by Gershon M. Ratner

Much educational litigation in this country ought to equalize, upgrade or, in certain cases, ct educational inputs. Cases have sought, for ple, to equalize the educational environment overall educational inputs for all students by desegregation,[1] to increase the level of ational expenditures for certain students,[2] to re provision of school lunches,[3] to end sion of exceptional children[4] and to abolish oral punishment in the schools.[5] But as of this ent, virtually no legal effort[6] has been made nsure that the schools successfully use their s to achieve perhaps the single most impor- output: that all children learn, at a minimum, asic skills of reading, writing and arithmetic. This article presents a preliminary analysis of lawyers might attack public schools' wide- d failure to ensure that all educable students the basic skills. Although the article focuses ossible litigation, much of the analysis is ly applicable to possible remedies through legislation or administrative regulations.[7]

In 1954 the United States Supreme Court nized that:

> Today education is perhaps the most important function of state and local government....It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[8]

In 1972 the Court explicitly recognized that it was vitally important to our society for all children to master the "three R's," at least through the eighth grade level.[9]

Yet a large percentage of students are not attaining sufficient mastery of even the most minimal and basic educational skills. The results of 1971 nationally standardized reading tests in the Boston public schools, for example, indicated that the vast majority of students were seriously failing to learn to read adequately. Although in second grade, most students were reading at or about the national average, by sixth grade, fifty percent of the students were one full year behind the national average, and by ninth grade, nearly two and a half years behind. Moreover, the median ninth grade student in almost half of the Boston schools (46.4%) was more than three years behind, and the median student in one-seventh (14.1%) of the schools was more than four years behind.[10]

Analyzing the test figures in light of relevant economic and racial data, two basic conclusions about inadequate learning of basic reading skills emerged. First, the problem was not confined to a single section of the city, economic group or race, but appeared throughout virtually the entire city school system. Second, the system failed worst in the poorest, predominantly minority sections of the city, failed somewhat less in the slightly less poor, predominantly white sections, but generally succeeded in the wealthiest, middle class, white areas.[11]

There is evidence that Boston school children's widespread failure to learn up to grade level applies as much to writing and arithmetic as it does to reading.[12] This pattern of large numbers

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of urban children, particularly low income and minority children, falling progressively behind in basic skills the longer they stay in school is characteristic not only of Boston but of many school systems throughout the country.[13]

As the Supreme Court has alluded to,[14] failure to learn basic skills frequently has disastrous consequences, not only for the individuals who fail but for the society at large. Interviews with Boston area employers confirmed that persons who have not mastered basic skills are frequently either denied jobs outright, or, if hired, are forced to remain permanently in low or entry level low-paying jobs.[15] Numerous national studies indicate that in the future persons without mastery of basic skills will be increasingly doomed to functional unemployability.[16] Further, a disproportionately large number of children who have failed to learn basic skills become juvenile delinquents[17] at great economic, psychological and social cost. Beyond this, people unable to participate intelligently in the political process due to lack of basic skills constitute an incalculable loss to themselves and to society.

But what, if anything, can lawyers do to require schools to teach all educable children[18] adequate basic skills? To answer this question, it is useful at the outset to distinguish between two different possible objectives. First, it may be possible to represent an individual student, either to recover monetary damages for denial of education or to compel the school system to provide remedial education to him, or both.[19] Second, it may be possible to represent the class of all students in a school or school system who are failing to learn basic skills adequately, to compel the system to compensate the class for denial of education, to compel remedial education or to institute appropriate system-wide changes to increase the level of learning of all children in the class.

There seem to be both advantages and disadvantages in representing either the individual or the class. Similarly, competing factors for each approach must be weighed in determining whether it is preferable to seek money damages, remedial education or a change in the entire teaching system.

Representing a single individual has the obvious advantage of greatly narrowing the scope of facts which would have to be investigated and prepared for litigation. It may be much easier to get expert testimony that a particular student, rather than a class, has the ability to learn, and that therefore the school system was derelict in failing to ensure that he did learn. A court may find the plight of a single individual more appealing and readily understandable than the plight of a class. And a court may be more willing to give relief to an individual, since individual relief would invariably require less governmental expense or judicial intervention in the administration of the defendant school system than relief for a class. Once relief is provided for a single individual, the same relief ought to be available to the class.

Representing a class, however, has the major advantage of publicly dramatizing the problems of the entire class,[20] and, if it is successful, will produce a remedy for the entire class rather than merely for the individual. Further, if the plaintiffs are able to prove that the school system is failing a large class of children, it may be much easier to satisfy the court that the failures lie in the school system rather than in the ability of the students.[21] In defending a suit against an individual student, the school system might try to impugn the ability, motivation or family background of the single individual, but would find it virtually impossible to prove such factors for each member of a large class.

Litigation strategies for the individual or class suit differ in a number of other factors and emphases. Although it might be more difficult to show that all members of a class, rather than a single student, had the ability to learn, it would be possible to show the system's irresponsibility in failing the entire class by showing that other systems succeeded with similar classes of children (without providing the factors that made any particular child succeed). Such evidence of success with similar classes, however, might not be very useful in establishing the system's responsibility for the failure of a particular child because the fact that a large class of children with certain economic, racial and ethnic factors in common was able to succeed on the average is not probative that any particular child sharing these common factors is able to succeed.

As to possible remedies, monetary damages has the obvious advantage of compensating a child or his family for the loss of earning power, and for the frustration and humiliation suffered as a result

school's failure to effectively teach the child skills. The threat of damage actions may be centive to improve teaching. On the negative however, damages by themselves will not ct the learning deficiency nor enable the child pe adequately with his remaining occupa-, cultural and political life. Moreover, courts e extremely reluctant to construe the law as ishing a duty to ensure that children learn skills (or, if they do so establish, to actually substantial damages) if they thereby open e local and/or state government to numerous ge suits.

Requiring the school system to provide a am of remedial education in the particular quately learned basic skill or skills has the tage of trying to directly correct the defect. s instance, one must seriously question how remedial educational programs work. The any particular program is demonstrated to the more sensible it is to seek to implement her things being equal. However, even where ial programs may be proven effective, two problems suggest themselves. First, if in-acies in a system are corrected by the ial remedy, the regular, defective teaching am remains unchanged.

Second, existing failures to teach effectively ue not merely to inappropriate instructional ods or curriculum,[22] but also in heavy re to teachers' low expectations for nts' ability to learn which have destructive s on student motivation.[23] A change to an ive remedial methodology may produce term increases in the level of learning basic but unless students are motivated and able to on their own after the end of a remedial , the remedy is much too limited. The same en will continue to need "remedial" courses ic skills every year. This is not the intended on of "remedial" programs and they should so used.

Requiring the school system to make neces-hanges in its regular teaching to reach those en who would otherwise not learn ade-y has the major educational and economic tage of forcing school systems to discard ient and ineffective teaching approaches. In ay, essential long-term improvements in the ion of the class of affected children would titutionalized for the future. This remedy does have the substantial drawback of requiring intensive factual investigation and expert witness preparation before a court would be willing to order a school system to institute changes in teaching practices, either pursuant to direct court order or pursuant to a plan devised by the system itself.[24] However, the immense advantages of long-term improvement in the system and in children's motivation and level of learning make it worth pursuing.

To substantiate the need for basic instructional change, plaintiffs must first be prepared to prove that there are large[25] numbers of students in the system who are failing to learn basic skills adequately.[26] Second, plaintiffs should note that the class they are representing consists only of educable children. Third, evidence should be presented that other systems, either locally or nationally, are effective in teaching basic skills to classes of students with economic, racial, ethnic and social backgrounds comparable to the plaintiffs'.

Proof of these three elements should be sufficient to create a presumption that the defendant system is acting inappropriately. The court might well order the defendant to examine the operations of schools which successfully teach comparable student populations and try to experiment with or institute those instructional approaches of the successful schools that are not already used in the defendant system.

Although it may not be necessary, it seems highly desirable that plaintiffs be able to show three further points. Fourth, plaintiffs should have experts who are able to identify the characteristics of the comparable successful schools nationwide and explain the extent to which the anecdotal and academic literature on teaching corroborates the importance of the characteristics they have identified.[27]

Fifth, plaintiffs' experts should have analyzed defendants' system to prove all the respects in which it does not use the educational practices which characterize the successful schools. Sixth and finally, if defendants are unable or unwilling to present their own reasonable plan, plaintiffs should be prepared to present concrete recommendations to the court as to what range of alternative changes should be implemented in defendant system.[29]

If plaintiffs are able to establish each of the above points, they will then have to demonstrate

that defendants do have a legal duty to ensure that all children learn basic skills to a certain standard. On the above record, except in the unlikely event that defendants were able to show that they had already incorporated substantially all of the characteristics of the successful schools, the courts should order defendants to institute appropriate changes, either pursuant to a court approved defendants' plan, or, in default thereof, direct court order.

A public school system's legal duty to ensure that all children learn the basic skills flows from a number of sources, including the Due Process and Equal Protection Clauses of United States Constitution, state statutes and constitutions and state common law. From the outset, it should be understood that in our country, teaching children the basic skills of reading, writing and arithmetic is a central purpose of public education. In *Wisconsin* v. *Yoder* the Supreme Court recognized that the teaching of basic skills had a critical role in the entire mission of the public schools, and reaffirmed that students' learning of such basic education is essential to the economic and political existence of our country.[30]

14th Amendment, "Deprivation of Liberty Without Due Process of Law"

Massachusetts,[31] and virtually all other states,[32] have laws which compel all children under a certain age (frequently 16) to attend schools involuntarily. An overriding reason for requiring such attendance is so that children will adequately learn basic skills.

Children are "deprived" of their "liberty" by being compelled to attend school. For children who do not in fact adequately learn basic skills, the compulsory attendance laws tend to become "irrational" and deprive them of liberty without due process of law in violation of the Fourteenth Amendment. As the court said in an analogous case (involving the involuntary commitment of persons to a mental hospital for treatment):

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[33]

Although the courts have not yet determined what level of learning of basic skills is necessary for education to be "adequate," the Supreme Court has enunciated the standards by which such "adequacy" must be judged: a level sufficient to enable citizens to participate intelligently in the political process, to qualify for jobs and be economically self-sufficient, and to be able to satisfactorily adjust to the technological, cultural, social, economic and political complexities of modern society.[34]

Achieving these purposes requires that all children learn basic skills at least to the level of the national norm for eighth grade.[35] Moreover, given the constantly increasing rate of change in our society and the corresponding increase in the need for heightened intellectual perception,[36] "adequate" education today for children who will be living much of their lives in the twenty-first century may well require a mastery of basic skills at least to the level of the current national norm for the tenth or twelfth grade.[37] Whatever standard for "adequacy" is eventually established, it certainly is not met by children who are reading at the sixth grade level in the ninth grade.[38]

14th Amendment Denial to Persons of "Equal Protection of the Laws"

By effectively teaching certain educable students basic skills, while at the same time not effectively teaching others, public school systems *prima facie* discriminate against the class of children allowed to fail, thereby denying them the "equal protection of the laws."

At a minimum, defendants have the burden of showing that this discrimination is "rationally related to a legitimate state interest."[39] Beyond that, insofar as plaintiffs can show that disproportionately large numbers of the children allowed to fail are racial minorities[40] and/or poor in absolute terms,[41] defendants should be required to show that this discrimination is not merely "rationally related to a legitimate interest" but that it is "necessary" to achieve a "compelling state interest".

Defendants might seek to justify the discrimination by asserting that they need additional funds to provide adequate education to plaintiffs' class and that they have a "legitimate interest" in not wishing to raise or spend such additional funds. The government's interest in saving funds is

f, however, a "legitimate governmental interest" fficient to sustain an otherwise invidious dis-imination such as we have here.[42] Moreover, rther investigation may well confirm that effec-e education of failing children will not require ditional expenditures but rather a restructuring existing teaching.[43]

Second, defendants might allege that they ve a legitimate administrative interest in main-ning the existing teaching structure to avoid bstantial administrative burden. The Supreme urt has recognized, however, that the interest in oiding administrative inconvenience is not suffi-ent to justify discrimination.[44]

Third, defendants might avow that they have legitimate interest in preserving the existing aching structure because at least its educational nsequences are known, whereas new approaches ght in fact produce worse educational results. e greater the probability of success from anges to new approaches plaintiffs can show g., success of other schools with comparable dent populations), the less persuasive becomes fendants' assertion that they should not be quired to attempt change.

Even if plaintiffs are only able to show a all probability of improvement, at a minimum e court should require defendants to experiment a small scale with alternative approaches. Based the results of different experiments, the court uld then require system-wide implementation of atever approaches were found to be effective.[45]

State Statutes and Constitutions

State statutory and constitutional provisions th respect to state and municipal duties to ovide public education may vary greatly and ust be investigated individually by state. It is ely, however, that most states have provisions ich construe the purposes of public education include assurance that all educable children equately learn basic skills.

In *Doe* v. *San Francisco Unified School strict*,[46] for example, plaintiff alleges in his mplaint that the "Constitution and Laws of the ate of California" impose the duty on the local hool district to instruct students in the basic lls of reading and writing. Further, plaintiff ges that California statutes require the school trict to "design the course of instruction of-fered in the public schools to meet the needs of the pupils for which the course of study is prescribed".[47]

In New Jersey, state law requires local school districts to provide a "thorough and efficient" education.[48] In Massachusetts, state statutes require local communities to "provide an amount of money sufficient for the support of the public schools,"[49] to "provide and maintain a sufficient number of schoolhouses, properly furnished," to "provide fuel and all other things necessary for the comfort of the pupils,"[50] to maintain high schools "adequately equipped," and to have high school principals and teachers of "competent ability."[51] Further, the statutes provide that school committees shall approve of private schools only "when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town. . . ."[52]

Given the purposes of education as articulated by the Supreme Court,[53] the vital role of learning basic skills in achieving those purposes, and the legislatures' concerns for "thorough and efficient," "sufficient," or "adequate" education or for meeting the "needs" of pupils, it seems most reasonable to construe these statutes to require, *at a minimum*, that all educable children adequately learn basic skills.[54]

Negligence

At common law, negligence consists of failing to exercise reasonable care toward a person for whom one has a duty of care.[55] Under state laws, constitutions[56] and the due process clause of the Fourteenth Amendment,[57] school districts have a duty to educate their students in basic skills. In the situation in which a group of children is educable and comparable children demonstrably have been effectively educated by other school systems, the failure to educate such children is *ipso facto* the failure to exercise "reasonable care" and constitutes "negligence."[58]

Quasi-Contract

At common law, a "quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of

dissent." The doctrine of quasi-contract was created because "no other suitable and really descriptive classification was available, and it was desired to make use of the remedial forms of action by which contracts were enforced."[59] "Official or customary" duties are quasi-contractual[60] and may therefore be enforced by a court order for specific performance, *i.e.*, an order compelling the party to discharge his quasi-contractual obligation.

In virtually all the states, citizen-taxpayers are required to pay a substantial part of their taxes for the support of the public schools.[61] In exchange for their taxes, taxpayers reasonably expect the schools to adequately educate their children.

Through official practice and custom school districts have historically assumed the duty to ensure that children learn basic skills. Even assuming, *arguendo*, that they have not assumed such duty, "reasons of justice" and equity require that school districts be deemed to have assumed such duty in exchange for citizens' payment of taxes.

Conclusion

If lawyers can establish a case along the lines suggested in this article, including the six main points of proof and a demonstration that school systems have a legal duty to ensure adequate learning of basic skills, plaintiffs will have a very powerful case.

Nationwide attention should increasingly be focused on the failure of schools to ensure that all of their students adequately learn the basic skills of reading, writing and arithmetic. In-depth legal and social science research with respect to remedies for this situation should be undertaken as a priority.

Footnotes

1. *E.g., Keyes v. Denver School District No. 1,* 41 L.W. 5002 (U.S.S.Ct., 1973); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Brown v. Board of Education,* 347 U.S. 483 (1954).

2. *E.g., San Antonio Independent School District v. Rodriguez,* 41 L.W. 4407 (U.S.S.Ct., 1973); *Serrano v. Priest,* 96 Cal. Rptr. 601, 487 P.2d, 1241 (1971)

3. *E.g., Davis v. Robinson,* 41 L.W. 2090 (U.S.D.C.R.Is., 1972); *Briggs v. Kerrigan,* 307 F. Supp. 295 (D. Mass., 1969), aff'd 431 F.2d 967 (1970).

4. *E.g., Mills v. Board of Education of the District of Columbia,* 348 F. Supp. 886 (D.D.C. 1972); *Pennsylvania Association of Retarded Children v. Pennsylvania,* 334 F. Supp. 1257 (E.D.Pa., 1971), 343 F. Supp. 279 (1972).

5. *E.g., Glaser v. Marietta,* 351 F. Supp. 555 (U.S.D.C.W.D.Pa.,1972); *Ware v. Estes,* 328 F. Supp. 657 (N.D. Tex., 1971), aff'd per curiam, 458 F. 2d 1260 (5th Cir. 1972); *Murphy v. Kerrigan,* Civ. Act. No. 69-1174-W (U.S.D.C.D. Mass.) (final decree entered June 2, 1970 enjoining corporal punishment in the Boston public schools).

6. The first known case to raise issues in this area is *Doe v. San Francisco Unified School District,* Civ. Act. No. 653-312 (Sup. Ct., San Francisco City, complaint filed Nov. 20, 1972).

7. The article is exploratory, not definitive; its goal is to express an analytical framework, not to provide the extensive legal and social science research which will be necessary to support the analysis. The author well recognizes the need for such research, and with other colleagues, is currently seeking foundation funds to complete it.

8. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

9. *Wisconsin v. Yoder,* 92 S. Ct. 1526, 1531-2, 1536-39 (1972).

10. See unpublished working paper by Gershon M. Ratner, David Bookhout and Kristen Apgar, October 18, 1972, on file with the Harvard Center for Law and Education, pp. 3-4, n. 19-22, hereafter cited as *Working Paper.*

11. *Working Paper,* p. 5, n. 23.

12. *Id.,* pp. 6-8.

13. See Schafer and Polk, *Delinquency and the Schools,* pp.229-30, 235 (1967), part of The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime;* U.S. Government Printing Office, Washington, D.C., 1967.

14. *See* p. 15, *supra.*

15. *Working Paper,* pp. 9-11.

16. See National Commission on Technology, Automation and Economic Progress, *Technology and the American Economy,* Vol. I, Washington, D.C., U.S. Government Printing Office, 1966; United States Department of Labor, *Manpower Report of the President,* Washington, D.C., U.S. Government Printing Office, 1965; Ronald G. Corwin, *A Sociology of Education,* New York, Appleton-Century-Crofts, 1965, p. 124; Grant Venn, *Man, Education, and Work,* Washington, D.C., American Council on Education, 1964; Seymour L. Wolfbein, "Education and Employment," in Eli Ginzberg, *The Nation's Children,* New York, Columbia University Press, 1960.

17. *See,* Schafer and Polk, n. 13, *supra* at p. 223, 230-31 and articles cited; "Delinquency and the Schools," Office of Education, HEW, appearing in *Task Force*

Report, n. 13, *supra* at p. 278 *et seq.*

18. This article focuses throughout only on that lass, consisting of the vast majority of children, who have he intellectual ability to learn basic skills and would be egarded by experts as "educable." Future references to all children" refer only to this class.

19. *See*, generally, Sugarman, "Accountability Through the Courts," *School Review*, vol. 82, no. 2, Feb. 974, p. 233 *et seq.* University of Chicago.

20. Filing a major lawsuit can be very important ven if it does not eventually win in court because its rosecution, with accompanying publicity, sometimes has he salutary effect of inducing legislative or administrative nprovements in the practices challenged.

21. *See, Serna v. Portales Municipal Schools*, 351 . Supp 1279 (D.N.M. 1972).

22. *See, Keyes v. School District No. 1, Denver, olorado*, 445 F.2d 990, 1004 (10th Cir. 1971), modified n other grounds, 41 L.W. 5002 (U.S.C.Ct., 1973), and *erna*, n. 20, *supra*.

23. *See*, n. 26, *infra*.

24. *Cf. Serna*, n. 20, *supra*. The factual burden ecessary to support monetary damages or remedial ducation relief does not seem to be as great as that otentially necessary to warrant a change in the system. aintiffs seeking damages or remedial relief would obably have to establish the first two points. Such aintiffs would have greater leeway as to the third point, owever, because they might prove comparable students ere taught basic skills effectively either through regular struction, remedial programs, or otherwise. Such plaintiffs would not have to prove the fourth or fifth points at , since they would not be seeking a change in the gular system. Finally, as to the sixth point, plaintiffs eking damages would simply have to prove the estiated dollar damages; plaintiffs seeking remedial course lief, at most, might have to identify such an existing urse. Neither of these efforts would be likely to be arly as involved as recommending how a large part of an tire school system should be restructured.

25. *See, Serna*, n. 20, *supra* at 1281. For a scussion of what standard should be used to determine dequacy" see p. 18, *infra*.

26. Unlike the remedy of damages or remedial ucation, either of which may appropriately be given to ingle student, the remedy of changing the system seems propriate *only* if there is a substantial class of children versely affected by the current system.

27. Cf. *Serna*, n. 20, *supra* at 1282. Although it is no means certain what teaching characteristics generly are effective for teaching basic skills, based on eliminary investigation and common sense, the following factors are probably important: high perceived cher expectation for student performance; extensive of discussion and student-expressive methodologies, her than exclusive reliance on traditional rote itation method; curriculum familiar to students' exiences; teachers knowledgeable about, and interested in, students' sub-cultures; substantial time devoted to teaching basic skills; close monitoring of students' learning progress; availability of individualized instruction; private, rehabilitative discipline rather than public punishment; and relaxed, supportive classroom atmosphere. *See*, generally, George Weber, *Inner City Children Can Be Taught to Read: Four Successful Schools*, Council for Basic Education, (Washington, D.C., 1971); *Working Paper*, pp. 17-26, and books cited. There is no reason to think that implementation of these approaches requires any greater pupil expenditures than existing expenditures.

28. *Cf. Serna*, n. 20, *supra* at 1282.

29. The overall goal would be to institute teaching approaches and classroom conditions which would be most likely to produce effective teaching of basic skills. Teachers and principals should be hired, promoted, disciplined and fired in large part based on their success in teaching, or enabling others to teach, basic skills and their ability to develop the kinds of teaching approaches and conditions which are most likely to succeed. Intensive in-service training and psychological support should be made available to existing teachers and principals to enable them to change their approaches. Curriculum should be changed to relate closely to children's experiences and background. And students' parents and community representatives should be encouraged to participate actively in the teaching process, both at school and at home, in paid and non-paid capacities. In addition, further investigation may well suggest other appropriate changes. *See*, generally, *Working Paper*, pp. 27-37.

30. *See*, n. 9, *supra*; accord, n. 8, *supra*; see *Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217, 1225 (E.D. Mich., S.D. 1970).

31. M.G.L.A.c. 76, Secs. 1, 2.

32. *See, Wisconsin v. Yoder*, n. 9, *supra* at 1538-40, and n. 15.

33. *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. N.D. 1971). Defendants might argue that they provide adequate education but that the children do not learn because of their own inadequacies. Plaintiffs would have to rebut this by showing that the children are educable and that other schools are effective in teaching comparable children. Plaintiffs would then argue that the schools have the responsibility to take the children as they find them and do whatever is necessary for the children to learn. To accept the defendants' argument that the schools should not be required to rectify childrens' educational deficiencies would make the schools essentially useless and make compulsory attendance for such children irrational.

34. *Wisconsin v. Yoder*, 92 S. Ct. at 1536 and n. 8 and 29, *supra*.

35. *See, Id.* at 1536.

36. *See*, generally, Alvin Toffler, *Future Shock*, (Bantam Books, New York, 1971); n. 16, *supra*.

37. *See, Wisconsin v. Yoder*, 92 S. Ct. at 1536; *Robinson v. Cahill* Civ. Act. No. A-58 (Supreme Court of New Jersey, September Term 1972) Slip Opinion pp.

42–3.

38. *See*, p. 16, *supra*.

39. *E.g., Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 172 (1972).

40. *E.g., Graham v. Richardson*, 403 U.S. 365, 371–77 (1971).

41. *See, San Antonio Independent School District*, n. 2, *supra* at 4412–15.

42. *See*, n. 26, *supra*.

43. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

44. *Reed v. Reed*, 404 U.S. 71, 76 (1971); cf. *Stanley v. Illinois*, 405 U.S. 645, 656–59 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1969).

45. Insofar as defendants used the same teaching approaches in all schools, but children in certain schools learned, while children in others did not, the use of the same approaches is an "overinclusive classification" in violation of "equal protection"; *i.e.*, treating persons differently situated in terms of their educational needs the same way denies equal protection equally as much as treating persons similarly situated differently. In *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D.N.M. 1972), the court adopted exactly this kind of analysis and ordered the school district to provide specialized programs for Spanish-speaking children. (*But see, Lau v. Nichols*, 483 F. 2d 791 (9th Cir. 1973), rev'd. on other grounds, 42 L.W. 4165 (U.S.S. Ct. 1974).) And the Supreme Court has likewise recognized that certain overinclusive classifications are illegal. *See, In re: Application of Fre le Poole Griffiths for Admission to the Bar*, 41 L.W. 5143, 5145 (U.S.S. Ct. 1973); *Sugarman v. Mc L. Dougall*, 41 L.W. 5138, 5142–3, (U.S.S. Ct. 1973); *Cleveland Board of Education v. La Fleur*, 42 L.W. 4186, 4192 (U.S.S. Ct. 1974) (Powell, J., concurring). As the Court said in *Jenness v. Fortson*, 403 U. 431, 442 (1971): "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . ." *See*, generally, Tussman and Tenbroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

46. *See*, n. 6, *supra*.

47. *Id., Amended Complaint*, filed October 31, 1973, p. 16.

48. *See, Robinson v. Cahill*, n. 36, *supra* at pp. 24, 34, n. 9, 35, 40, 42-51.

49. M.G.L.A. c. 71 §34.

50. M.G.L.A. c. 71 §68.

51. M.G.L.A. c. 71 §4.

52. M.G.L.A. c. 76 §1.

53. *See*, pp. 15, 18, *supra*.

54. As the New Jersey Supreme Court said in *Robinson v. Cahill*, n. 36, *supra* at 42–43: "Today, a system of public education which did not offer high school education would hardly be thorough and efficient. The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."

55. *See*, Prosser, *Law of Torts*, 3rd. Ed. West Publishing Co., St. Paul, Minn. 1964, p. 146.

56. *See*, p. 19, *supra*.

57. *See*, p. 18, *supra*.

58. Numerous specific kinds of claims for negligence might be made, including, for example, failure to be aware of students' inadequate learning, failure to notify the parents of students' academic failure, repeated assignment of books which the child could not read because of his learning deficiencies, assignment of teachers unqualified to teach the student, etc. *See*, generally, complaint in *Doe v. San Francisco School District*, n. 6, *supra*. Senior school officials, including superintendents, principals and school committee members may be directly liable for negligence in training and supervising their teachers. See *Carter v. Carlson*, 447 F. 2d 358 (D.C. Cir. 1971); *Thomas v. Johnson*, 295 F. Supp. 1025 (U.S.D.C.D.C. 1968).

59. *See*, generally, Sugarman, note 19, *supra*. *Corbin on Contracts*, 1 vol. ed. 1952, pp. 28–9.

60. *In re: Shawsheen Dairy*, 47 F. Supp. 494, 497 (D. Mass. 1942).

61. *See, San Antonio Independent School District*, n. 2, *supra* at 4421 and n. 102.

TITLE I: More of the Same?

by R. Stephen Browning and Jack Costello, Jr.

In 1965, after more than a century of deliberation and constant prodding by education groups, Congress enacted a landmark bill designed to provide substantial federal funding for America's public schools. The name of the legislation was the Elementary and Secondary Education Act, commonly known as "ESEA."[1] Title I, the most beneficently funded title of ESEA with an initial appropriation in excess of one billion dollars, was designed to provide funds "to expand and improve" the educational programs offered to "educationally deprived children."[2] The goal of Title I is to break or at least retard America's "cycle of poverty" by providing extra or "compensatory" educational services to children who reside in areas with high concentrations of low income families and who are behind in school.

ESEA is slated for expiration on June 30, 1974 and is now being considered for renewal by Congress. Barring unforeseen circumstances, it appears that ESEA will be renewed and that the essential elements of the Title I portions of the current law will be retained.[3] The funding level for Title I in its renewed form will be increased from the current $1.5 billion to more than $1.8 billion.[4]

Currently, Congress is considering what form the new Title I legislation will take. The Administration was pushing hard for a more streamlined version of Title I: fewer restrictions on the program and greater, if not unlimited, latitude for state and local education decision-makers. These efforts to relax the requirements of Title I fund dissemination were bitterly opposed by key legislators who want to retain the restrictions to insure that Title I funds are used to provide the services for which they are intended.

Because of the current uncertainty as to both the precise form that renewed Title I legislation will take and the exact funding levels that will be available, it is an appropriate time to assess the effectiveness of the program thus far. Indeed, at a time when the productivity and effectiveness of education is being debated so hotly among social scientists,[5] it is essential that policy makers attempt to examine the effectiveness of an education program which has allocated more than $10 billion in the past eight years. Such an evaluation, however, is difficult.

Although federal law has always required evaluation of Title I projects, the quality of the resulting reports has frequently been called into question.[6] Additionally, it is difficult to assess the effectiveness of the programs because there is mounting evidence that many projects funded by Title I did not provide compensatory education either because resources allocated to the educationally disadvantaged were not supplementary or, if they were supplementary, the youngsters to whom they were provided were not educationally disadvantaged.[7]

This article, divided into three parts, will examine the federal, state and local administration of Title I over the past eight years. Part I will describe generally the numerous rules and requirements established for Title I and the government structures and enforcement mechanisms. In an effort to provide a clearer picture of the mechanics and politics of Title I administration, Part II will focus on the single requirement of "comparability," the restriction against unequal funding of schools before the addition of Title I funds. Part III offers some concluding thoughts as to how the administration of the Title I program can be improved, assuming it is renewed for the 1974–75 and following school years.

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PART I
TITLE I: A GENERAL SURVEY

The Structure and Operation of Title I

To understand the structural framework of Title I administration, one must be familiar with both the *legal* and *political* relationships among the three levels of government responsible for overseeing Title I projects: the U.S. Office of Education (U.S.O.E.), state education agencies (SEA's) and local education agencies (LEA's). The legal relationships are spelled out in the Title I legislation and related regulations and program directives.

Legal Relationships

Title I funds are distributed to the states according to a rather complicated formula.[8] The funds appropriated by Congress for Title I have never equalled the total authorization. In 1966, $959 million of the $1,093 million authorized was appropriated, leaving a shortfall of $134 million. By 1970 the shortfall had increased to $1 billion, with $2.3 billion authorized and $1.3 billion appropriated.[9] Under the Title I legislation, each state's entitlement equals its maximum allocation multiplied by the proportion that the national appropriation bears to the national authorization.

To obtain its Title I allocation, each SEA must apply to U.S.O.E. and make assurances that it will only approve funding for local programs that comply with the Title I legislation and regulations.[10] Similarly, LEA's (*i.e.*, local school districts) who wish to participate in the program must apply to the SEA for Title I allocations. The SEA will approve the LEA's applications, provided that the proposed programs meet the Act's requirements.[11]

While the SEA authorities have the responsibility for approving and disapproving local applications, they must make their determination on the basis of standards established in the Title I legislation as well as the basic criteria established by the Commissioner of the U.S. Office of Education.[12] Among the criteria established by the Commissioner thus far are:

> The projects must be "designed to meet the special educational needs of educationally deprived children in the school attendance areas having high concentration of children from low income families," and "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs. . . ."
>
> Provisions must be made for evaluating the effectiveness of the program and meeting the special educational needs of the eligible children.
>
> The local educational agency must make periodic reports and keep records which will enable the state educational agency to verify the reports and to fill its obligations to the Commissioner of Education.
>
> LEA's must make provision for providing educationally deprived children in private schools, including parochial schools, with "special educational services and arrangements." However, the control of funds for private schools and the title to all property purchased with funds must be in a public agency.
>
> In the case of application for funds for planning, the planning must be directly related to the Title I programs and the funds must be needed because of the "innovative nature of the program" or "because the local education agency lacks resources necessary to plan adequately."[13]

The amount of money for each state and each district is determined by Congress while the determination of program content and character is left to the states and localities. In preparing Title I applications, LEA's are permitted to identify the eligible educationally disadvantaged youngsters in their districts, to assess the needs of those children and to design educational programs to meet those needs. The SEA has the authority to approve those applications consistent with the rules and regulations established by the U.S. Office of Education and any additional rules and regulations which the state may wish to impose. SEA's also have the responsibility to monitor the operation of local Title I programs and to report periodically to the U.S. Office of Education on the effectiveness of

hese local programs and their compliance with ederal law.

Contrasted against the broad authority and esponsibility placed on local and state education gencies, the federal role in administering Title I is ather small. It approves state applications sub-nitted by state departments of education and nonitors the enforcement efforts by states in aining compliance with applicable Title I laws. he principal counterweight to this almost com-plete federal delegation of programmatic responsi-ility is the right of the Commissioner to establish basic criteria" to guide administration of Title I t the state and local level.[14]

One commentator summarized the legal rela-ionships among the various branches of govern-nent responsible for Title I administration in the ollowing way:

> The U.S. Office of Education bypasses the state department of education in determining the allocation of grants and establishes basic criteria which must be met by local districts, but it has no operating control over the projects. The states have the responsibility for approving projects but they must apply federal criteria in carrying out this responsibility. Local districts have access to earmarked funds and latitude in designing projects, circumscribed only by the effects of state supervision and state criteria.[15]

Political Relationships

Despite the legal delineation of the rights nd responsibilities of the various levels of govern-nent charged with the administration of the Title program, the actual behavior of educational dministrators at the local, state and federal levels s governed by an entirely different set of *political* ules. As one writer put it:

> Until the ESEA, federal education acts had never challenged the authority and responsibility of the states for public education. State legal control over public education coupled with unrestricted local authority over the operation of the schools had endured for over a century at the centerpiece of education's political mythology.[16]

Although the original drafters of Title I may have seen the purpose of the law as providing educational resources for educationally deprived children, traditional educational lobbyists viewed the passage of Title I as an opening in the dike surrounding the U.S. Treasury. Accordingly, at the outset of the program, great emphasis was placed on getting the Title I funds flowing immediately into the local school districts.[17]

The powerful lobby groups representing educational administrators who supported the enactment of ESEA agreed upon the "child benefit" theory for pragmatic reasons. It overcame the resistence of those who wanted federal aid to private school children and it provided the opportunity to gain additional funds for hard pressed school districts throughout the United States.[18] Although strings were to be attached to these funds, the belief shared by these administrators was that the strings would not be pulled.

To understand the expectation that Title I funds could be used so broadly, one must know more about the people who have been called upon to administer the program. First, federal U.S.O.E. officials have traditionally taken passive roles with respect to the states. As one U.S.O.E. staff member explains:

> Title I is a service oriented program with predetermined amounts of money for the states. This sets a framework where the states are entitled to the money. Other than making sure states got their money and making sure it [is] spent, [there is] no role for the Office of Education. I don't know anyone around here who wants to monitor. The Office of Education is not investigation oriented; never has been, never will be.[19]

Many federal education officials feel that if U.S.O.E. pushes too hard to enforce the requirements of Title I, Congress will replace categorical programs of this sort with general aid programs, leaving U.S.O.E. with even less influence than it now has. Still others may think that the most important thing about the program is to get the money to the school district and not to waste time establishing and administering a complex set of rules designed to ensure the money is used properly.

Perhaps the best explanation of the actions

of officials charged with the administration of Title I programs can be found in Morton Grodzins' observation that they do not have an elective political base:

> The undisciplined political party system impels administrators to seek political support for their programs. The parties do not supply this support, and administrators and their programs cannot survive without it. . . . This situation makes the administrator play a political role.[20]

According to Grodzins' theory, it appears that federal education officials view themselves as having a weak bargaining position and therefore place minimal demands upon state and local school districts. The fundamental flaw in this reasoning is that their enforcement power does not necessarily rest upon political action. When federal laws are violated, other remedies besides political action can be called upon.

SEA officials, like U.S.O.E. officials, have also exhibited pronounced reluctance to enforce the legal mandates of Title I. Their poor enforcement record can be attributed to several factors: lack of a political base; small staffs in relation to the amounts of money they are called upon to administer; and little orientation toward compliance activities.[21]

A Review of Compliance and Enforcement Efforts by Education Agencies

The Title I laws briefly described above form the basis for a potentially effective enforcement program by federal and state education officials. These laws require LEA officials to provide assurances to the states that they will comply with the rules and regulations governing Title I expenditures. Similarly, SEA's are required to provide written assurances to HEW that they will distribute Title I funds only to school districts who comply with Title I laws.[22] If LEA's submit applications which on their face indicate a proposed illegal use of Title I funds, SEA's are legally obligated to withhold funding.[23] Similarly, if a state education agency discovers that a LEA is using Title I funds illegally under the applicable federal laws, it is obligated to terminate funding until the project is brought into compliance.[24] State education agencies and the U.S. Office of Education are both obligated to provide fiscal control and auditing to insure lawful distribution.[25] Finally, upon finding that a state has failed to comply with the applicable rules and regulations governing Title I, U.S.O.E. is empowered to notify the SEA that further payments will not be made until it is satisfied that there "is no longer any such failure to comply."[26]

Despite the authority and the legal responsibility to enforce the law, the administration of Title I throughout the past eight years has been replete with incidents of non-compliance and non-enforcement. In 1969, after reviewing several dozen Title I audits conducted by the HEW Audit Agency during 1965 through 1968, the Washington Research Project and the NAACP Legal Defense and Educational Fund, Inc. made the following five findings:

> The intended beneficiaries of Title I—poor children—are being denied the benefits of the act because of improper and illegal use of Title I funds.
>
> Many Title I programs are poorly planned and executed so that the needs of educationally deprived children are not met. In some instances there are no Title I programs to meet the needs of these children.
>
> State departments of education which have major responsibility for operating the program and approving Title I project applications, have not lived up to their legal responsibility to administer the program in conformity with the law and the intent of Congress.
>
> The United States Office of Education, which has overall responsibility for administering the Act, is reluctant and timid in its administration of Title I and abdicates to the states its responsibility for enforcing the law.
>
> Poor people and representatives of community organizations are excluded from the planning and design of Title I programs. In many poor communities, the parents of Title I eligible children know nothing about Title I. In some communities school officials refuse to

provide information about the Title I program to local residents.[27]

Four years after these findings were made, still ring true. Certainly there have been ovements in local school districts' efforts to gn and operate lawful and effective Title I ects. There is also evidence to suggest that rcement activities by the states and the federal rnment have improved. Nevertheless, the sit-on is still wholly inadequate. Dozens of new / Audit Reports filed since the publication of Washington Research Project report condemn y unlawful uses of Title I funds. Although e violations may be more subtle than the ones unted in the HEW audits of the mid-1960's, still represent frustrations of the Congres-al mandate for Title I and undermine the ntial for assessing whether federally funded pensatory education represents a sound na-al policy.

O.E.'s Monitoring Capacity

Although U.S.O.E.'s Division of Compensa- Education (D.C.E.) (the department re-sible for administering Title I) has substan-y increased its staff since the Washington earch Project report, it still lacks sufficiently prehensive monitoring capacity to insure the per use of Title I funds. D.C.E. officials spend majority of their time serving the needs of educational officials.[28] Comparatively little is devoted to independent monitoring of SEA pliance activities. Moreover, despite the fact D.C.E. may have improved its monitoring bility, there has been no concomitant increase he incidence of U.S.O.E. withholdings of Title ds.[29]

The Political Problem

The problem, it seems, is not one of compe-e, but of political inhibitions, because top / officials continue to exhibit reluctance to rce the law for fear of alienating state and education officials. To understand this re-nce, one has to know about the isolated ts in the past by U.S.O.E. officials to enforce law. In 1966, the then U.S. Commissioner of cation Francis Keppel attempted to withhold the Chicago public school system more than million in Title I aid because of certain alleged violations of federal law. This withholding action was quickly rescinded when pressure was brought to bear on U.S.O.E. by the Mayor of Chicago through the White House. Some say that this particular incident led to the rapid departure of Commissioner Keppel from U.S.O.E.[30]

The Chicago incident is but one episode in an eight year saga of state and local education officials' resistance to the applicability of Title I laws. The State of Mississippi has provided many such incidents which illustrate the total disregard its state and local education officials have for Title I regulations. In 1969 an investigation of the Mississippi Title I program revealed that for more than four years U.S.O.E. had erroneously relied upon the assurances of the Mississippi State Education Agency that the Title I funds had been lawfully used in its local school districts. HEW Audit Agency reports confirmed that millions of Mississippi's Title I dollars were spent without regard to and in conflict with Title I requirements.

In December 1968 federal education funds were terminated by the HEW Office of Civil Rights in Cahoma County, Mississippi because the school board had refused to submit an acceptable desegregation plan under Title VI of the Civil Rights Act of 1964. Subsequently, additional investigations by U.S.O.E. field studies and HEW audits revealed that the unlawful elements found in Cahoma County's Title I program were replicated in practically all of Mississippi's local districts.[31] Finally, in July 1969, the Mississippi education officials acknowledged their deficiencies in applying federal Title I criteria and agreed to federal enforcement action to correct such abuses as the gross lack of comparability in the allocation of local funds.[32]

Many of the violations found in Mississippi were historically related to local official treatment of black schools. In the mid-1960's, despite the Supreme Court's mandate in *Brown*, black schools typically remained segregated and received substantially less state and local education monies than did white schools. The sudden availability of Title I funds, beginning in the fall of 1965, presented two somewhat inconsistent temptations to Mississippi's white local school officials. First, it prompted them to stretch the rules on selection of eligible schools (the legal criteria for such selection is the relative poverty of the school attendance areas, and in the South, black school areas were

typically poorer than the white school attendance areas) to include as many white schools as possible. A second temptation was to use the Title I funds as an equalizer to bring the level of spending in the black schools closer to those in the white schools. For example, in 1965 in the delta town of Angilla, Mississippi, there were two elementary schools—one white, the other black. The white school had an average expenditure of $366 per pupil, while the black school received only $86 per pupil. Even though the black school was the county's sole recipient of Title I funds, these funds did not provide extra services for the children; they probably even failed to close the gap between the black and the white school.[33]

Title I funding was temporarily withheld from Mississippi for the 1969–1970 school year until state education officials assured U.S.O.E. that changes would be made in the state department's practices for reviewing Title I applications. This represented the first strong posture struck by U.S.O.E. to enforce its own rules with noncompliant SEA's. As the head of the Division of Compensatory Education at that time put it:

> U.S.O.E.'s experience with Mississippi was to lead to larger events. For the first time in the recollection of U.S.O.E. staff, the Office had taken strict "withholding" measures to enforce its own policies. . . .Previous efforts to achieve compliance either had taken the peaceful route of negotiation to greater adherence or had secured the promise to do so from erring states found in violation of rules. . . .[34]

Since this initial hard line was taken, Title I funds have continued to flow into Mississippi without interruption. And, although there have been continuing citations by the HEW Audit Agency for misspent Title I funds in Mississippi, no additional sanctions have been employed against the state.

State Enforcement Efforts

Prior to the advent of Title I in 1965, state departments of education wielded little influence in administrative power over public education. With substantial infusion of federal funds and the legal authority to administer the program as the principle for insuring local compliance with federal law, the state departments had vastly increased potential to exercise the leadership, control and enforcement that would permit them to raise the quality of education in their states. For example, one prominent section of ESEA, Title V, provided substantial funding at the state level to improve the capabilities of state departments of education. Yet the substantial weaknesses in many departments, coupled with their history of nonenforcement of state laws, resulted in minimal enforcement activity. As the former director of the division of Compensatory Education explained:

> The state agencies and the local districts, by and large, were used to going their own ways, which often meant disregarding federal requirements. In the case of ESEA Title I, practically total reliance was placed on the integrity and capability of the states to live up to their "assurances" to the Commissioner. And if U.S.O.E. had a weak enforcement reputation, that of the states was even weaker.[35]

Meetings between federal and state education officials throughout the 1960's were exercises in futility for U.S.O.E. In these meetings federal officials described what new rules and regulations were to govern the expenditure of Title I funds while state officials made it clear that they believed the federal government lacked authority to establish rules to govern how these funds should be used. The state education officials argued, invariably, that decisions concerning the ultimate use of Title I funds were in the province of local education officials, consistent with whatever controls the state might decide to employ.[36]

Significantly, not all SEA officials were resistant to federal rules. There was a small minority of chief state school officers and state Title I officers from such states as California, Connecticut and Massachusetts who not only approved many of the rules established by Title I officials but enacted more stringent rules of their own.[37] This trend has continued and accelerated in the past several years.

In the 1970's increased pressures from a variety of sources have been brought upon state departments of education to improve the administration of public education. Because of their desire to see greater results for local and state taxes used to support public schools, state legisla-

vith the support of activist citizen groups, enacted a wide variety of accountability ion. These legislations typically require only statewide testing or assessment system be shed. However, in some states the depart- of education have been invested with the to adjust local education practices whenever scores on statewide assessments fall below minimum levels. In this move toward ide assessment systems, state departments ning increasing authority over the operation l schools.

Another force working to enhance the au- of state education agencies has come from its filed by children challenging the failure te departments of education to provide ate resources, services or leadership to local s. The landmark suit in this area is *Robinson ill,*[38] decided by the New Jersey Supreme in spring 1973. The *Robinson* decision held he State of New Jersey failed to carry out its tutional mandate to provide a "thorough" efficient" education to all of the children in ate, and that the state failed to establish any al operational standards for the quantum of tion offered to students. The New Jersey Department of Education is now completely g its Code of Regulations in an effort to out more clearly what will be expected of chools.

Thus it appears that the "carrot" of new lism in education, initiated in the mid- with the passage of ESEA, and the "stick" suits and community action have pulled and d to substantially boost the level of admin- ve capability of state departments of educa- Yet, for many states, there still remains vast to enhance their disposition and enforce- capability.

w of Enforcement Actions Litigated Under

Surprisingly little litigation has occurred Title I. During the past eight years, hun- of audits, studies and reports have been hed by public and private agencies docu- ng a wide variety of illegal uses of Title I and violations of Title I rules and regula- but less than two dozen suits have been Of these, only a few have been prosecuted to oint that a court rendered a final decision. The vast majority of the Title I suits are settled, usually when the local school district agrees to correct the program deficiencies cited in the complaint. To date, all Title I suits have been filed almost exclusively in federal court and can be divided roughly into three categories: right to information suits, access to decision-making suits and suits seeking to correct unlawful uses of Title I funds.

Right to Information Suits

The typical right to information suit is brought by parents who have been rebuffed by local school officials in their requests for Title I applications or other documents pertaining to the "planning and operation" of the local school district's Title I program. Under the Title I regulations, local school districts are required to make these documents available to the public[39] and to distribute them free to the members of the parent advisory council.[40] Dozens of audit reports confirm that school districts have failed to make these documents available despite repeated requests by parents and other interested groups. Since the law is so clear on this point, suits filed to obtain information are invariably settled by local districts agreeing to provide the requested information.

A related set of suits deals with the identification of parents of Title I eligible children. In one New Mexico school district, local parent advisory council members were denied a list of Title I eligible parents. They brought suit in federal district court alleging that the list of parents was necessary "to the comprehensive planning, operation and evaluation of the Title I program . . . ."[41] and therefore was public information under the Title I regulations. The U.S. District Court in New Mexico agreed with the plaintiffs' assertions and held that the school district by law was required to release the requested information. However, on appeal to the U.S. Circuit Court of Appeals for the 10th Circuit, the lower court decision was reversed. It held that plaintiffs had stated no cause of action arising from HEW regulations because "Congress did not intend to imply a civil remedy available to PAC members in the Title I statutory scheme," and further that "no compelling interests exist dictating that this court should exercise jurisdiction."[42] Significantly, the

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10th Circuit Court of Appeals disposition of the standing issue is contrary to the decisions of the other federal courts who have been faced with claims brought by Title I parents under the Title I Act.[43]

Access to Decision-Making Suits

The majority of suits brought under Title I have challenged the failure of LEA officials to afford adequate opportunities for participation to Title I parents. Under applicable Title I regulations, local education agencies are required to establish parent advisory councils (PAC's). A majority of the members of these PAC's must be parents of children eligible to be served by Title I. PAC members have certain rights: to review the effectiveness of past Title I programs; to inform and consult with parents concerning the services to be provided to their children; and to be involved in "the planning, development, operation and evaluation" of Title I projects, both existing and proposed.[44] These rights are also so unambiguously expressed in the law that counsel for local defendants invariably seek to settle the suits by accommodating the parents' demands.[45] However, some school district defendants have refused to change their programs with regard to parent participation until ordered to do so by federal courts.[46]

A related type of law suit deals with the authority of decentralized school districts to make decisions regarding the use of Title I funds. For example, when the New York City school system was decentralized by an act of the legislature in 1969, a dispute arose over the authority to decide the use of Title I funds. Under the decentralization legislation, more than thirty decentralized school districts were given the authority to decide the content of their educational programs. However, the centralized board retained its decision-making powers regarding the educational programs funded by Title I. In response to an action brought by the Community School Board officials for Community School District No. 3, a state court ordered that the decentralized district had the exclusive authority to determine how the Title I funds were to be used.[47]

Suits Seeking to Correct Unlawful Uses of Title I Funds

The third category of Title I litigation deals with the type of educational programs that can be funded legally under applicable Title I laws. These suits typically allege one or more of the following violations: "supplanting,"[48] "noncomparability,"[49] failure to "concentrate" Title I funds[50] and failure to conduct "proper evaluations."[51] In *Natonabah* v. *Board of Education of Gallup McKinley School District*,[52] Indian school children who attended public school in rural sections of McKinley County, New Mexico challenged the legality of the county's Title I program. They alleged, *inter alia*, that the district had committed massive comparability violations when it used Title I funds to bring the total expenditures in the rural, predominantly Indian schools up to the level of expenditures maintained with state and local funds alone in the urban, predominantly Anglo schools. The court agreed with the plaintiffs' contentions and found that the defendant school district spent less money per Indian pupil than non-Indian pupil on school buildings, equipment and instructional services from combined state and local sources. It also found that disparities between these two types of schools existed in many forms: "unequal school accreditations, achievement, overcrowdedness and the assignment of experienced faculty." The court found further that:

> Notwithstanding the federal aid programs designed to give an extra measure of educational opportunity to Indian children, the facts pointed to the conclusion that their educational opportunities were seriously substandard and that one of the reasons for these disparities was that the local school authorities did not expend a proportional amount of the district's resources on Indians.[53]

The court held that the plaintiffs' parents had standing and that the school district's program was in violation of applicable Title I laws and the Fourteenth Amendment to the U.S. Constitution. Instead of ordering a withholding of Title I funds and other federal education monies that were the subject of this litigation, the court ordered affirmative relief whereby the local school district defendants were required to submit a comprehensive plan for correcting disparities under guidelines established by the court.[54]

Another significant decision regarding the

se of Title I funds was rendered six months later
another federal court case, *Nicholson* v.
ittenger.[55] [For an analysis of this case, see
equality in Education #15, November-1973,
ages 86-87.]

A third suit concerning the unlawful use of
itle I was filed against the Missouri Department
f Education, challenging its refusal to permit
itle I funds to be used in non-public schools for
ompensatory education projects.[56] The U.S.
ourt of Appeals for the Eighth Circuit found that
e statutory provisions permitting the use of Title
funds in non-public schools were constitutional
nd that the plaintiffs should be permitted to
eceive Title I funding. This decision is now under
view by the U.S. Supreme Court and a decision
expected in early spring 1974.

.S.O.E.'s Role in Title I Litigation

There is a consensus among U.S.O.E.
fficials who are responsible for enforcing Title I
ws that the enforcement powers available to
em are both inadequate and potentially counter-
oductive. They perceive that the sole legal
medy available to them to correct legal viola-
ons by SEA's is to withhold Title I funds.
ederal education officials are reluctant to rely
on such a remedy, not only because it "throws
e baby out with the dirty bath water" in that it
eprives the school children of much needed Title
funding, but also because it may raise the ire of
cal and state officials who might be able to exert
olitical influence at the federal level to reverse
y U.S.O.E. decision to terminate funding.

It is incorrect to assume that withholding of
nds is the only remedy available to federal
fficials. Instead of employing the politically
olatile technique of withholding funds, U.S.O.E.
able under the law to refer violations to the U.S.
epartment of Justice and to request their assist-
nce in bringing about compliance with federal
ws. Under the Title I applications submitted by
e states to the federal government, state educa-
on agency officials have provided written assur-
nces that locally approved programs will operate
compliance with applicable Title I rules and
gulations. Under related programs, HEW in the
st has requested the U.S. Department of Justice
seek affirmative compliance with those assur-
nces.

For example, in 1968 HEW requested the Department of Justice to obtain compliance from the State of Alabama for equal employment opportunity assurances it made in a variety of applications for federal funds under programs administered by HEW. In an action brought in federal court in Alabama, it was held that HEW was not restricted solely to a fund cut-off as a remedy for violations of the rules regarding the use of federal funds. On the contrary, the judge held that the state had made a contract for these funds and that they were obliged to carry out the terms of the contract.[57] Accordingly, he ordered the specific performance of the contract and required the state to continue to receive the money with the precondition that it correct the various violations found.

PART II
COMPARABILITY

Comparability Compliance and Enforcement

Before July 1, 1972:

The comparability amendments passed by Congress in spring 1970 called for all districts who applied for Title I funds to demonstrate equality in school services by July 1, 1972. Before a district could qualify for Title I funding, it was required to demonstrate that its Title I schools were comparable to the average of its non-Title I schools for the 1970-71 school year in the following areas:

1. Ratio of pupils to certified classroom teachers.
2. Ratio of pupils to other certified instructional staff.
3. Ratio of pupils to non-certified instructional staff.
4. Expenditure per pupil for instructional salaries, exclusive of amounts paid on the basis of longevity.
5. Expenditure per pupil for other instructional costs.

A five percent leeway for each of the five criteria was allowed so that the comparability standard was achieved if a Title I school had no more than a five percent shortfall from the non-Title I average. Lack of comparability in any one of the five criteria made a school non-

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comparable and a single non-comparable school made the entire district ineligible for Title I funds. No district was to receive Title I monies for the 1972-73 school year unless it either met the five requirements in all schools or submitted an "acceptable" plan outlining how compliance would be achieved.

In September 1972, three months after the July 1 deadline for demonstrating comparability, a study of eighty of the nation's largest districts revealed that seventy-nine of the districts (98%) were non-comparable and that in forty-five (56%) of these districts more than half of the Title I schools did not meet the standards. Futhermore, the study disclosed that fifty-eight percent of the non-comparable districts submitted no plan for achieving comparability as required by law. Of the thirty-four districts that did submit plans, only twelve were considered minimally adequate.[58]

Remarkably little if any compliance with the comparability regulations was achieved prior to the 1972-73 school year, more than two years after Congress mandated comparability.[59] Moreover, notwithstanding widespread comparability violations, not a single district in the country—out of the nearly 5,000 which were required to submit comparability reports—lost a penny of Title I funds because of failure to achieve comparability by July 1, 1972.

July 1, 1972—July 1, 1973:

Developments during the 1972-73 school year, the first year during which the comparability laws were legally enforceable, yielded little change in allocation of educational resources by local districts.[60] U.S.O.E. continued its unstated policy of refusing to withhold Title I funds from states which failed to sanction non-comparable districts.

U.S.O.E.'s laxity in enforcement was exceeded only by its ability to confuse the states about what the requirements for comparability were. On November 15, 1972, six weeks prior to the date that LEA's were required to submit comparability reports to the states, U.S.O.E. announced that eligibility for Title I funds would be based on drastically revised comparability requirements. Although these proposed revisions were only speculative and would apply to the following school year (1973—74), most districts failed to submit any reports by December 31, 1972 as they were required to do under the regulations then in effect. SEA officials were left in limbo, not knowing which rules would apply. Finally, on March 21, 1973, U.S.O.E. published a total revision to the comparability regulations. These new regulations, which were "proposed" and not "final," were to apply to comparability reports submitted to the states on or before July 1, 1973. The finalized rules were not published formally until June 28, 1973. Hence, it was not until three days prior to the filing date that local and state school officials knew what the rules were.

Perhaps the most significant element of the amended comparability regulations, at least with respect to the effect on U.S.O.E. enforcement policies, was the shift in the period for which the data was to be collected. Under the old regulations the school districts were required to show comparability in the second previous school year (*e.g.*, the reports due to the states on July 1, 1972 contained resource allocation data for the 1970—71 school year). U.S.O.E. officials decided in fall 1972 that it was not fair to enforce comparability rules on the basis of "historical" data, so the new regulations required that comparability would be determined on the basis of "current" school year data.[61]

A significant side effect of this change was that it seriously undercut the potential for comparability enforcement for two school years. As noted above, the 1971—72 school year was completely bypassed because, owing to the confusion of what rules applied during November and December 1972, nearly all districts failed to submit reports for the 1971—72 school year. Similarly, the 1972—73 school year was, in effect, overlooked because the revised regulations (which required current data) were issued too late during the 1972—73 school year to expect the local districts to comply with them. Thus, more than three years following the enactments by Congress of the comparability amendments, there still were no effective enforcement efforts underway.

Among other things, the new regulations telescoped the three staff ratios used previously into one instructional staff ratio.[62] The salaries per pupil ratio remained intact, but the "other instructional costs" ratio is now only required of districts with one or more non-comparable schools. Where there were previously five criteria for comparability, only two remained.

Another major change was the elimination of he requirement that non-comparable districts ubmit a plan for achieving comparability. In order o receive funds under the new regulations, non omparable districts must submit a revised com arability report demonstrating that educational esources were actually reallocated so as to achieve omparability. "We will do better next time" is no onger good enough.

These new regulations were the result of onsiderable discussion and compromise among ederal, state and local education officials. Al hough they made it easier for districts to achieve omparability, they improved the prospects for ffective enforcement by plugging the "plan" oophole with a requirement for reallocation of esources and the submission of a "revised report."

To test the effect of the new regulations and o assess the progress of compliance, an indepen ent study was conducted in 112 districts.[63] Both he old and the new standards were applied to ach district. Under the old standards 101 districts 90%) were non-comparable. However, under the ew regulations fewer districts appeared non omparable (*i.e.*, 82 districts or 73% of the study). n only five districts (4.5%) were over half the itle I schools non-comparable.

While the data in this study were limited, two eneralizations are permissible. First, using the old iteria, only 21.5 percent of the districts in the udy were over one half non-comparable as ompared to 56.2 percent in the original Septem er 1972 study, suggesting some improvement in ompliance between July 1972 and July 1973.[64] econd, it demonstrates that the new regulations re easier to comply with.

Post July 1, 1973:

The new regulations also set a new timetable or submitting reports.

May 31, 1973: Pupil enrollment, staff totals nd yearly instructional salary totals were to be ollected on or before this date for the 1972–73 chool year.

June 30, 1973: LEA's were required to ubmit a comparability report to SEA's. The eport was to contain data collected on or before lay 31, 1973. The SEA's were to use this report o determine whether LEA's were eligible to eceive Title I funds for the 1973–74 school year.

September 15, 1973: Each state was required to submit a summary form identifying all districts not then in compliance.

October 1, 1973: The date established by the U.S. Commissioner of Education for LEA's to collect comparability data for reports to be submitted to the state on December 1, 1973.

November 1, 1973 (and each succeeding November 1): The U.S. Commissioner of Education is required to specify a date (set for October 1, 1973 for the first year's reports) no later than November 1, on which comparability information for the schools must be collected.

December 1, 1973 (and each succeeding December 1): Comparability reports were required to be submitted to the SEA's. These reports must demonstrate that the LEA's achieved comparability for the 1973-74 school year or their Title I funds for 1973-74 must be withheld until comparability is demonstrated in a revised report.

January 1, 1974 (and each succeeding January 1): The states must follow the same procedure as on September 15, informing U.S.O.E. of non-comparable districts. A copy of the comparability report for each LEA in the state which has been determined to be in a stratified national sample of LEA's for that year must also be submitted as well as copies of all revised reports.

A recent tabulation of the state summaries (see Table I) required to be sent to U.S.O.E. on or before September 15 which outlined the compliance efforts made by districts for the 1972-73 school year revealed that:[65]

> Of some 4,805 districts required to submit comparability reports by July 1, 1973, 541 (11.26%) had failed to produce forms as of September 15.
>
> 525 districts (12.3% of the total number submitting forms) failed to demonstrate comparability.[66]
>
> Of the 525 non-comparable districts, 133 (25%) either submitted inadequate revised reports or failed to submit revised reports.[67]

Reports submitted for the 1973–74 school year showed some improvement. The summaries (see Table II) required to be submitted to U.S.O.E. on or before January 1, 1974 yielded the following results:[68]

Out of 3,381 districts required to

TABLE I Spring 73

	Total Title I Dist.	# of Req Detailed Reports	Reports Actually Submitted	Corrective Action Required	Revised Acceptable Reports Submitted	Not Approved– Funds Withheld
Alabama	125	125	125	4	4	–
Alaska	23	7	6	2	1	1
Arizona	200	45	44	6	5	2
Arkansas	381	15	15	1	–	1
California	903	433	343	134	73	61
Colorado	168	75	75	5	4	1
Connecticut	163	108	92	–	–	10
Delaware	22	9	9	–	–	–
District of Columbia	–	1	1	1	1	–
Florida	–	–	–	–	–	–
Georgia	188	188	188	2	2	–
Hawaii	7	7	7	–	–	–
Idaho	–	–	–	–	–	1
Illinois	–	–	–	–	–	–
Indiana	281	281	281	6	6	–
Iowa	450	450	423	5	3	2
Kansas	290	73	61	8	8	–
Kentucky	188	23	23	4	4	–
Louisiana	66	51	51	15	15	–
Maine	227	227	141	–	–	–
Maryland	24	24	24	10	10	–
Massachusetts	242	119	119	15	10	5
Michigan	565	157	141	27	21	16/6
Minnesota	–	–	–	–	–	–
Mississippi	155	155	155	2	2	–
Missouri	400	46	38	7	8	2
Montana	286	15	15	–	–	–
Nebraska	308	23	23	3	3	–
Nevada	11	11	11	1	1	1
New Hampshire	147	147	124	1	1	–
New Jersey	417	91	91	22	22	–
New Mexico	87	23	23	6	6	–
New York	695	695	693	21	21	–
North Carolina	152	59	59	26	26	–
North Dakota	271	7	7	1	1	–
Ohio	590	186	186	4	3	withdrew
Oklahoma	611	23	20	7	6	4
Oregon	–	–	–	–	–	–
Pennsylvania	506	96	63	5	5	10
Rhode Island	39	25	24	2	2	1
South Carolina	96	20	20	14	14	–
South Dakota	190	40	40	28	28	–
Tennessee	146	50	49	20	–	21
Texas	1,029	127	99	26	3	27/17
Utah	40	40	30	12	9	3
Vermont	246	5	5	–	–	–
Virginia	131	131	131	20	20	–
Washington	298	53	52	3	3	–
West Virginia	55	55	55	35	35	–
Wisconsin	404	253	74	13	9	7
Wyoming	43	11	8	1	–	1
Total		4,805	4,264	525	392	
			11.26%		25%	

Table II Fall 73

	Total Title I Dist.	No. of Reg. Detailed Comp. Rpts	Reports Actually Submitted	Corrective Action & Rev. Reg.	Revised Reports Sub. & App.	No. LEA's With Funds Withheld
Alabama	125	37	27	–	–	–
Alaska	–	–	–	–	–	–
Arizona	184	45	44	4/3	1	3/2
Arkansas	383	29	29	2	2	–
California	907	406	357	10	5	5
Colorado	157	63	31	5	5	–
Connecticut	163	81	80	–	–	1
Delaware	22	9	9	–	–	–
District of Columbia	–	1	1	1	1	–
Florida	67	67	67	10	10	–
Georgia	188	51	51	4	4	–
Hawaii	–	–	–	–	–	–
Idaho	–	–	–	–	–	–
Illinois	–	–	–	–	–	–
Indiana	265	238	227	11	6	4
Iowa	432	38	38	–	–	–
Kansas	291	61	61	2	2	–
Kentucky	186	20	20	1	1	–
Louisiana	66	34	34	5	4	1
Maine	227	227	226	–	–	–
Maryland	24	24	23	7	7	–
Massachusetts	–	–	–	–	–	–
Michigan	548	150	145	6	6	–
Minnesota	415	28	28	3	–	3
Mississippi	155	12	12	–	–	–
Missouri	343	43	43	4	4	–
Montana	155	13	13	1	1	–
Nebraska	301	22	22	3	3	–
Nevada	11	11	11	–	–	–
New Hampshire	147	11	7	–	–	–
New Jersey	–	–	–	–	–	–
New Mexico	94	25	25	–	–	–
New York	617	617	617	8	8	–
North Carolina	151	53	53	10	10	–
North Dakota	259	8	8	1	–	1
Ohio	570	179	179	1	1	–
Oklahoma	586	23	23	–	–	–
Oregon	218	54	52	3	3	–
Pennsylvania	498	95	95	1	–	1
Rhode Island	38	25	25	2	2	1
South Carolina	96	51	50	20	20	1
South Dakota	210	17	17	–	–	–
Tennessee	146	56	56	8	8	–
Texas	996	128	124	13	13	5
Utah	39	39	–	–	–	–
Vermont	221	5	5	–	–	–
Virginia	130	130	130	7	7	–
Washington	–	–	–	–	–	–
West Virginia	55	48	48	6	6	1
Wisconsin	412	96	59	1	1	37
Wyoming	38	11	11	1	1	–
Totals		3,381	3,183	161	142	
			5.86%		11.89%	

submit comparability reports by December 1, 198 (5.86%) failed to do so.[69]

161 districts (5% of the total number submitting forms) did not meet the comparability standards.

19 of these non-comparable districts (11.89%) either submitted inadequate revised reports or failed to submit revised reports.

A comparison of the two sets of state summaries offers an improved picture of comparability compliance, assuming that the data summarized is accurate, reliable and verifiable. However, just how much of this improvement is due to the new regulations rather than to genuine efforts at compliance is not clear. Some may be attributable to the districts' increased sophistication in reporting.

The apparent progress raises a number of important issues for further study. What has been done about the 541 districts in September and the 198 districts in January who failed to submit any comparability reports? What has happened to districts who failed to submit revised reports? Have Title I funds been withheld from these districts as required by law? The answer to these questions *should* be reflected in the state summaries; unfortunately that is not the case. The problem stems from U.S.O.E.'s wording in its standardized questionnaire.[70] Technically, it does not require states to account for districts who submitted late reports or who never sent reports to the state. Hence, Maine listed 227 districts who were required to submit reports, but it only received 141 reports. Wisconsin was even worse, with 253 reports required and 74 received; for California the numbers were 433 and 343, respectively. Yet on the forms submitted by these three states there is no mention of what action, if any, was taken against the unaccounted for districts.[71]

By drafting the question in terms of applications that "have not been approved," the September 4524 form is ambiguous about what actions were taken with respect to the Title I funds in those districts failing to submit revised reports. Is an unapproved application the equivalent of a funds cut-off as far as the states are concerned? If funds are in fact being held back, are these funds provided retroactively to districts when the application is finally approved? The law clearly states that funds withheld due to non-comparability are not to be supplied retroactively. Yet, the September form failed to address this issue: it left some discretion to the states in filling out the form and as a result failed to produce the desired information about the status of Title I funding for non-compliant districts.[72]

The January 4524 form is an improvement in both wording and response. The relevant question now reads: "List all LEA's from which the State Education Agency is required to withhold funds because they have not submitted acceptable revised comparability reports." This new wording clarifies the funding status of districts failing to submit revised reports and sheds some light on the question of retroactive payments. It is clear from the summaries that funds were withheld from at least twenty-five districts across the country for failure to submit revised reports. For eight of these districts, the dates of fund terminations were listed, indicating that resumption of funding was not retroactive.[73]

This new wording, however, does not clarify the status of districts not submitting original comparability reports by December 1. For example, the California summary notes that 407 districts were required to submit reports, but lists only 357 districts as having submitted reports. Colorado required sixty-three districts to submit reports, but only thirty-one were actually submitted. Neither state accounts for its differences. Nevertheless, with the exception of these two states, the number of inconsistencies between reports required and reports received is greatly reduced from the September summaries. Several states account for differences in their answers to question six.[74] In all other states the overall non-response rate is less than one percent. Similarly, inconsistencies between the number of districts failing to submit revised reports and the number of non-comparable districts are also many fewer. The January summaries, though not entirely debugged, give a much more accurate view of what is actually happening at the state and local level and offer a more effective monitoring tool for U.S.O.E.

One critical issue left unresolved by the September and January state summaries is the

extent to which the comparability reports reflect the actual allocation of resources in local districts. One might argue that U.S.O.E. efforts over the past three years have been directed to produce reports that demonstrate comparability, not to produce comparable districts. U.S.O.E. procedures for reviewing comparability forms have been limited to checks for completeness and arithmetic mistakes. To date U.S.O.E. has exerted almost no effort to assess the reliability of data which purports to show comparability. However, now that the majority of comparability reports demonstrate "paper" compliance, it would seem to be a particularly propitious time for U.S.O.E. to expand its monitoring policies and begin to check the validity of the data.

The Lambda System

Some efforts in this direction have been initiated by the Office of HEW's Assistant Secretary for Planning and Evaluation (ASPE). In early 1973 ASPE contracted with a private consulting firm, Lambda Corporation, to develop a computerized system that would check comparability reports submitted annually to U.S.O.E. This system was supposed to be operational by fall 1973, in time to check some of the reports required to be submitted by July 1, 1973. These "Spring Survey" reports were to be used by the states to determine whether LEA's would qualify for Title I funding for the 1973–74 school year. However, due to a variety of factors (*e.g.*, late finalization of the regulations, tardy submission of spring reports by LEA's to SEA's and by SEA's to U.S.O.E. and delays in developing an operational computer system in Washington), the spring Lambda Report was not available to HEW until February 1, 1974, exactly seven months after the reports were required to be submitted to the states.

Thus, although computerized analysis of the spring survey revealed much interesting information, it was obsolete upon receipt by HEW. Apparently U.S.O.E. does not plan to utilize this data to enforce comparability. And it now appears that, because of delays in contracting for analysis of the fall comparability reports, the HEW computer analysis of reports due December 1 may not be available until *after* the March 31 deadline for cutting off funds to delinquent districts. Hopefully, the fall Lambda report will yield more encouraging results than the spring report. Using the same actual comparability reports, the Lambda system checks a district's reported comparability ratios against those generated by its computer system.[75] As defined by Lambda, an LEA's comparability form is "deemed to have a discrepancy if any of its reported numbers have been discerned to be internally inconsistent." The results of the Spring Survey are revealing and disturbing: out of the 526 reports analyzed for miscalculations, more than half contained "discrepancies;" in five states Lambda found discrepancies in every report submitted.[76]

Were the Lambda system operating without the seven month timelag of the first report, the information provided could become an invaluable monitoring tool for HEW. Although Lambda staff indicate that continual use of the system would produce increasingly sophisticated calculations and monitoring, efficient and timely management of the system seems something that HEW cannot or will not pursue. And despite the potential usefulness of such a system, automated monitoring still remains dependent on the quality of the data submitted in the reports themselves.[77]

It is significant to note that some federal officials are aware of the need to expand U.S.O.E.'s monitoring capacity. A January 1974 story in *Education U.S.A.* quotes one U.S.O.E. official as admitting that current district analyses are superficial and yield only "paper comparability."[78] According to the story, U.S.O.E. intends to visit "selected" districts in order to verify payroll, purchasing and personnel records. However, U.S.O.E. has made no futher plans in this direction and no districts have been selected for visits.

Once again, the task of investigating comparability violations falls upon concerned parents and local organizations.

Independent Efforts to Gain Comparability Compliance

Since July 1, 1972, the date that the comparability laws took effect, local attorneys and parent groups across the country have been monitoring compliance by their local districts. In addition to examining comparability reports for incidents of non-comparability, several techniques

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have been developed which permit monitors to go "behind" the data on the comparability reports to verify its accuracy.[79] One such check is to compare pupil enrollments and teacher assignments on a comparability report with similar data compiled independently each year by the HEW Office of Civil Rights (OCR). The OCR data, which provides total enrollment and full-time teacher statistics for each school in every district in the country, can be used to make three crucial comparisons.

> OCR data can be used to verify enrollments recorded on comparability reports. The two sources differ in the way they count pupils but the difference is slight and does not prevent comparison.
>
> OCR teacher data can be used to check a comparability report's listings for the FTE (full-time equivalent) instructional staff category. The OCR pupil and teacher counts taken together can also be used to check the pupil/teacher ratios listed on the comparability report.
>
> OCR data can be used to check the validity of non-Title I averages, the standard against which Title I schools are measured. OCR data for non-Title I schools is used to reconstruct these averages.

OCR checks of pupil data have not produced substantial disparities on the whole, although there have been several cases of data variances which have lead to further investigations. One fascinating example is a study done on the 1972-73 comparability report for New York City's academic high schools.

New York's comparability report utilized the five ratio formula of the old regulations. It listed data for all schools, as well as non-Title I averages. Preliminary comparison of the figures in the pupil column on the report (marked "net register") with the OCR figures revealed substantial inconsistencies. The variances tended to be much greater between non-Title I schools than Title I schools. Curiously, the OCR enrollments indicated that the "net register" column greatly *overstated* enrollments for non-project schools and slightly understated some project school enrollments.

After several months of investigation by The Citizens' Committee for Children (a private citizens' group), it was discovered that New York school officials were using adjusted enrollment figures. The "net register" figure used in the comparability report was not an actual enrollment figure, but a calculation based upon the actual enrollment adjusted by the average number of subjects taken each day.[80]

The average number of subjects taken in the New York High Schools during the 1971–72 school year (the latest year for which we have data) ranged from 4.9 to 7.7. Research by the Citizens' Committee indicated a positive correlation between a school's average number of subjects and the socioeconomic characteristics of its attendance area (*i.e.*, the wealthier neighborhoods tended to have a greater number of subjects offered). The implication this had for comparability was considerable. Since any school with an average number of periods exceeding five inflated the "net register," the official comparability report for New York's academic high schools showed no incidences of non-comparability. However, when actual register pupils were used, the schools in wealthier areas were shown to have substantially higher per pupil expenditures and substantially lower pupil/teacher ratios.[81] And when actual register pupils were substituted into the City's comparability report, substantial non-comparability emerged for five Title I schools. The amount of additional resources necessary to make these schools comparable was calculated to be nearly one million dollars.[82]

The net register formulation in New York not only worked to frustrate the purposes of comparability, but also had severe implications for the allocation of state and local resources to educationally disadvantaged children in 1971–72. High school students in New York City's poor neighborhoods had substantially higher pupil/teacher ratios than students in wealthier neighborhoods, and equally as important, they had a much shorter instruction day. Children attending poor schools received less schooling at lower resource levels.

The OCR teacher data is even more important than the OCR pupil enrollments. The regula-

tions prohibit inclusion of federally paid instructional staff in demonstrating comparability; yet, incorporating staff paid from federal funds into comparability reports is common practice for many school districts. The OCR teacher statistics, which include teachers paid from federal funds, provide an excellent comparison.[83]

Schools listed on comparability reports as having a significantly higher number of teachers than the OCR data, or districts which consistently list pupil/teacher ratios conforming to OCR figures, are immediately suspect. Special scrutiny is warranted when suspect schools are borderline on comparability. One example among many is that of the 1971–72 comparability report of the Mobile County Public Schools. The data for several marginally comparable schools was at odds with OCR. One school, Fonvielle Elementary, was listed on the comparability report as having thirty-one teachers and a 33.61 pupil/teacher ratio (the maximum permissible ratio for comparability in Mobile was 34.7). The OCR data, however, listed only twenty-five teachers for Fonvielle, which was the equivalent of a pupil/teacher ratio of 38.20. According to OCR, a minimum of three and one half teachers were needed at Fonvielle to bring it into compliance.[84] Assuming a base salary of $6,200, it would cost the Mobile County school system a minimum of $21,638 to make this one school comparable.

This same Mobile County report is also an excellent example of the third major use of OCR data, checking non-Title I averages. The regulations require only that averages for non-Title I schools be supplied on the comparability report; school-by-school data for non-Title I schools is not required. Since non-Title I school statistics are not listed individually on most comparability reports, it is a simple matter for a district to achieve facial comparability by fudging the non-Title I averages in a way that lowers the standards by which project schools are judged. The OCR data provides an invaluable check of these averages. The July 1972 Mobile report listed six project schools in the grade span of 1–6. The non-Title I average for these schools (adjusted by 5%) was 35.72 pupils per teacher, and all the project schools were listed as comparable with ratios ranging from 29.00 to 35.09. The OCR data produces an entirely different picture. The non-Title I school ratio becomes 29.41 and the Title I school ratios range from 29.67 to 32.92. According to the OCR data for the Mobile elementary schools not one Title I school was comparable, although the official report reflected full compliance. A conservative estimate is that it would require 8.6 teachers to correct the OCR differences. Using the previous base salary of $6,200, this would cost the school system more than $50,000.

As these examples have demonstrated, OCR comparisons are not precise indicators. Wherever possible, such findings should be supplemented with additional sources such as actual payroll lists, staff assignments and other information generated by the individual school system. Nonetheless, the OCR data helps direct investigations by private citizens to likely violations and, unlike information from local districts, is readily available.[85]

Next to the OCR data, the most important comparability check is a copy of the district budget. The first check is to see if the total budget includes federal Title I funds, which are usually excluded. A comparison can then be made between the district's total dollars budgeted for instructional salaries and a like figure generated from the comparability report.[86] This is a particularly valuable second check for districts suspected of including Title I teachers in the comparability reports. Where the totals from the comparability report indicate substantially more spent on instructional salaries than the budget and where the OCR data is equally out of alignment, there is *prima facie* evidence that the district has illegally included teachers paid from federal funds in its report.

Comparability Enforcement—A Summary

The quality of comparability reporting has improved because state and federal monitoring systems have improved. However, two principal problems remain. First, there is little if any effort to determine the extent to which comparability reports reflect actual allocation of resources within school districts (*i.e.*, is "facial comparability" the same as "actual comparability?"). Second, even when monitoring systems disclose that a school district is non-comparable (either "facially" or "actually"), there is little evidence that SEA's or U.S.O.E. have taken or will take the necessary steps to enforce compliance with the comparability requirements.

City	# of Students	# of non-Comparable Title I Schools	% of Title I Schools that were non-Comparable
New York	1,125,449	110	22%
Los Angeles	620,707	Not yet received	Not yet received
Chicago	557,141	"	"
Philadelphia	282,965	"	"
Detroit	276,655	57	37%
Dade Cty. (Miami)	241,809	Not yet received	Not yet received
Houston	255,410	0	0
Baltimore	186,600	39	44%
Dallas	154,580	9	12%
Cleveland	145,196	0	0
District of Columbia	140,000	23	34%
Memphis	138,714	44	77%
San Diego	124,604	8	29%
Columbus	106,676	0	0

The reluctance of U.S.O.E. to enforce the comparability regulations was amply illustrated in a memorandum recently distributed among high level officials within HEW. The memorandum entitled "Title I Comparability—Enforcement and Disincentive Issues" dealt with the political problems of enforcing comparability and reveals that HEW is aware of the substantial non-comparability that exists throughout the country. For example, in an appendix to the memorandum, the above comparability statistics from U.S.O.E.'s Spring 1973 Survey were provided for fourteen of the nation's largest urban school districts.[87]

Despite this awareness of non-comparability, federal officials maintain their reluctance to enforce the law. Instead, there seems to be increasing discussion about what types of steps might be taken to pressure the school districts into compliance. In this connection, the HEW memorandum considers three options: 1) to refer cases to the Justice Department to bring suit against non-compliant districts; 2) to adopt a graduated penalty system; or 3) to allow over-budgeting to compensate for non-compliance. Considerations of this type should have occurred prior to July 1, 1972, the first date when comparability was to be enforced. Nevertheless, it is encouraging to note that at least some HEW officials are beginning to go through the motions of enforcement. Until these decisions are made, it will be incumbent upon private attorneys acting on behalf of Title I parents to gain compliance.

PART III
THE FUTURE OF TITLE I

It seems almost certain that a renewed and expanded Title I program will be in operation nationally for the 1974-75 school year. The latest Title I renewal bills being considered by Congress include a number of distinct improvements over the previous legislation. One improvement is that parent advisory councils (PAC's) will be required for each Title I project school where previously only district PAC's were required. Parents on school based PAC's will be selected by parents of children in the school rather than by school officials as is currently the case with district PAC's.[88]

Perhaps the most significant change is the modification of the formula by which Title I funds have been allocated among states and school districts. Under the old formula, school districts were entitled to Title I grants based on the number of children from families with annual incomes below $3,000 as well as on the number of children from families with incomes in excess of $3,000 who receive payments under the federal program of aid to families with dependent children (AFDC). The use of AFDC children in computing Title I allocations was originally added to the formula because the family income data was collected only once a decade, while the more frequently collected AFDC data would be a more accurate update to the poverty data from the

nsus. However, according to the House Com-tee Report, the use of AFDC statistics has sed a distortion in the formula:

> Over the years . . . AFDC children counted under the formula have grown to such an extent that they have overwhelmed the children counted from the Census. In 1966, 10% of the Title I children were AFDC children. During the present fiscal year they total over 60% of the children.[89]

To compensate for this increase, the Title I ewal bills under consideration substantially rease the number of AFDC children counted in allocation formula. First, the family poverty has been raised, thereby reducing the number AFDC children above the old poverty line. ond, the number of AFDC children counted ve the new poverty line has been reduced to thirds. The principal consequence of these changes is that the wealthier states, who tend to have relatively high AFDC rolls, will suffer corresponding decreases in Title I allocations, while the poorer states will have relative increases. An illustration of this effect may help to clarify the change.

During fiscal year 1974, New York State is eligible for almost four times as much Title I assistance as Texas (18% of the national total for New York vs. 4.5% for Texas), although Texas has only a slightly lower percentage of children in the country than New York (5.9% as compared to 7.4%). Under the new formula, Texas' share will increase to 10.9 percent, while New York's share will drop to 6.5 percent.[90]

Those who will lose most under the new Title I formulation appear to be large urban school districts. In a dissent to the Committee Report filed by a group of Congressmen representing urban constituencies, expected 1975 Title I alloca-

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tions were listed for forty-three of the nation's largest urban school districts. Of those listed eighty percent will suffer a fifteen percent reduction in funds, assuming the appropriation level for 1974 is retained for fiscal year 1975. Such a reduction represents the maximum possible loss under the new legislation.[91] Despite the relative loss among urban areas, the total funding level for the renewed legislation will probably be sufficiently high to increase the Title I allocations of most districts, even some urban ones.

It appears likely that the renewed Title I legislation will place stronger demands on state and local education agencies to comply with the laws governing Title I expenditures. Furthermore, the federal government's power to enforce Title I laws would be made more explicit than it is in the current law. For example, the Senate Committee on Education is contemplating the inclusion of the following language in its Title I renewal bill (S. 1539):

> Whenever the Commissioner, after reasonable notice and an opportunity for hearing, finds that there has been a failure, by any recipient of funds under any applicable program, to comply substantially with the terms to which such recipient has agreed in order to receive such funds, the Commissioner shall notify such recipient that further payments will not be made to such recipient under that program until they are satisfied that such recipient no longer fails to comply with such terms. Until the Commissioner is so satisfied no further payments shall be made to such recipient.
>
> *The terms of any application for funds under any applicable program shall constitute a contractual agreement between the Commissioner and the applicant. Such agreement shall be specifically enforceable by the Commissioner in any court of the United States. [Emphasis added]*[92]

If language similar to the above quoted passage is included in the Title I renewal legislation to be enacted during spring 1974, the mandate for the federal government to enforce Title I laws may be sufficiently bolstered to prompt a substantial increase in HEW's efforts. The prospect for increased federal enforcement will be greater if HEW separates the functional responsibility for enforcement from the responsibility to provide technical assistance and guidance to state and local education agencies who carry out Title I programs.

For example, the HEW Audit Agency could be given sole responsibility for determining whether or not compliance with comparability or other Title I regulations is being achieved by school districts. If compliance were not achieved, the Audit Agency, in conjunction with the Department of Justice, could move forward in efforts to achieve such compliance. Under this enforcement scheme, the responsibility to work with state and local education officials in guidance, technical assistance, evaluation and needs assessment would remain the responsibility of the U.S. Office of Education.

If one supports the concept of federal compensatory education, it is essential that positive steps be taken immediately to insure that Title I laws are enforced. The reason is quite simple: although significant lobbying efforts have been exerted over the years to increase the level of federal funding to thirty-three percent of the national total from its current level of seven percent, the prospects for such an increase are negligible at this time. The belief that Title I is simply a forerunner to expanded general federal aid contribution to public education is largely erroneous. Since Title I was established to increase the achievement levels of children in poor areas who are behind in school, public policy makers are beginning to look with increasing scrutiny at the program's actual effectiveness.

Footnotes

1. Pub. L. 89-10, 20 U.S.C. Secs. 236-244, 331-332b, 821-827, 841-848, 861-870, 881-885. For a good history of events leading up to and including the passage of the Elementary and Secondary Education Act, *see,* Bailey, Stephen K. et al., *ESEA: The Office of Education and Administrators of Law,* Syracuse, Syracuse U. Press, 1968.

2. 20 U.S.C. Sec. 241(a) *et seq.*

3. Final bills and supporting reports have been produced by the education committees of both the House (HR69) and Senate (S1539), and the consensus among Capital Hill observers is that these bills will be passed by both Houses by June.

4. 7 *Education Daily* 27, p. 1, February 7, 1974.

5. The relationship between the cost of education

s quality has received increasing attention since the ce of the "Coleman Report" in 1966 (Office of tion, Equality of Educational Opportunity). Among otable authorities in both sides are: C. Jencks, *ality* (1972); C. Silberman, *Crisis in the Classroom*); *On Equality of Education Opportunity* (1972) ihan & Mosteller eds.; J. Guthrie, *et al., School & ality* (1969).

6. 20 U.S.C. Secs. 241e(a)(1), (6) & (7), 45 C.F.R. 16.22(a). For a particularly comprehensive critique le I evaluations, see the Planar Corp., "The Silken Legislative Recommendations for Title I of the ntary and Secondary Education Act," HEW Con-OS 72-224, October 5, 1973, pp. 111-112.

7. *See,* generally, Washington Research Project, I of ESEA: Is it Helping Poor Children?" (1969); , et al., "Title I: A reanalysis and Synthesis of the nce," American Institutes for Research, Palo Alto, rnia, 1972.

8. 20 U.S.C. Sec. 241(d) and 45 C.F.R. Sec. 116.3 le that the maximum amount which a local school t (LEA) can receive is equal to 50% of the average upil expenditure in the state multiplied by the er of children between the ages of 5 and 17 whose es have an income less than $2,000, or if more than 0, whose families receive aid from the AFDC m. The maximum allocation for a state is the sum total maximum allocations for all of its districts, 45 Sec. 116.41. The total national allocation is the f all the maximum allocations for each state and tutes the authorization for the Title I program.

9. J. Hughes and A. Hughes, *Equal Education: A National Strategy,* Bloomington, Indiana, Indiana U. 1972, p. 24.

10. 45 C.F.R. Sec. 116.31(c).

11. 45 C.F.R. Sec. 116.34.

12. 20 U.S.C. Sec. 241e.

13. Harvard Center for Law & Education, *Title I tion Materials* (Revised edition, May 1972), pp.

14. 20 U.S.C. Sec. 241e.

15. J. Murphy, "Title I of ESEA: The Politics of menting Federal Educational Reform," *Harvard tion Review,* vol. 41, no. 1, February 1971, p. 40.

16. Hughes and Hughes, *op. cit.,* p. 59.

17. Hughes and Hughes, *op. cit.,* pp. 12, 38.

18. John F. Jennings, "Federal General Likely or Illusory," 2 *Journal of Law & Education* 0 (1973).

19. J. Murphy, *op. cit.,* p. 42.

20. Morton Grodzins, *The American System: A View of Government in the United States,* Chicago, McNally & Co., 1966, p. 270, as quoted in J. y, *op. cit.,* 45.

21. J. Murphy, *op. cit.,* pp. 52, 53.

22. 45 C.F.R. Sec. 116.31, Sec. 116.34.

23. 45 C.F.R. Sec. 116.34.

24. 45 C.F.R. Sec. 116.34(c).

25. 45 C.F.R. Sec. 116.48.

26. 45 C.F.R. Sec. 116.52.

27. Washington Research Project, *op. cit.,* pp. ii-iii.

28. Planar Corp., "The Silken Purse. . .," *op. cit.*

29. P. Briggs, "A Perspective on Change: The Administration of Title I of the Elementary and Secondary Education Act," Planar Corp., Washington D.C. (1973), p. 10.

30. Hughes and Hughes, *op. cit.,* p. 64.

31. Washington Research Project, *op. cit.* p. v.

32. Hughes and Hughes, *op. cit.,* p. 55.

33. *Ibid.,* pp. 78, 104.

34. *Ibid.,* p. 130.

35. *Ibid.,* p. 50.

36. *Ibid.,* p. 42.

37. *Ibid.,* p. 47.

38. 62 N.J. 473, 303 A. 2d, 273 (1973).

39. 45 C.F.R. Sec. 116.17(n).

40. 45 C.F.R. Sec. 116.17(o).

41. 45 C.F.R. Sec. 116.17(n).

42. *Lopez v. Luginvill,* U.S.C.A., 10 Cir. Slip Opin., P. 10 (August 27, 1973).

43. *Colpitts v. Richardson,* CA #1838 (D.C. Ma., October 20, 1970); *Babbidge v. Richardson,* CA #4410 (D.C. R.I., February 8, 1971), *See,* also Harvard Center for Law & Education, *Title I Litigation Materials, op. cit.,* Ch. 4, Memorandum on Standing and Jurisdiction, pp. 79-108.

44. 45 C.F.R. Sec. 116.17(o).

45. *See, e.g., Cantu v. Saunders,* CA #2773 (D.C. E.D. Wash., May 1973); *Smith v. Richardson,* CA #6978 (D.C. W.D. Ky., September 20, 1973).

46. *See, e.g., Sanchez v. Rafferty* (D.C. N.D. Cal., May 5, 1971).

47. *Community School Board, District No. 3 v. Bd. of Education,* 66 Misc. 2d 739 (S. Ct. N.Y. Co. 1971), *aff'd,* 38 App. Div. 2d 1932 (1st Dept. 1972).

48. 20 U.S.C. Sec. 241e(a) (3)(B), 45 C.F.R. Sec. 116.17(h).

49. 20 U.S.C. Sec. 241e(a) (3)(C), 45 C.F.R. Sec. 116.26 as amended June 28, 1973.

50. 20 U.S.C. Sec. 241e(a) (1), 45 C.F.R. Sec. 116.17(c) & (f), Sec. 116.18(a) & (e).

51. 20 U.S.C. 241e(a) (1), (6) & (7), 45 C.F.R. Sec. 116 22a & b.

52. 355 F. Supp. 716, D.C. N. Mex. 1973.

53. 355 F. Supp. at 733.

54. 355 F. Supp. at 732.

55. __F. Supp. __, D.C. E.D. Pa. (1973).

56. *Wheeler v. Barerra*, 441 F. 2d 795 (8th Cir., 1971), *cert. granted*, 42 L.W. 3226 (October 16, 1973).

57. *U.S. v. Frazier*, 297 F. Supp. (D.C. M.D. 1968), 317 F. Supp. 1084 (1970).

58. *See*, generally, the Lawyers' Committee for Civil Rights Under Law, School Finance Project, "Title I Comparability: A Preliminary Evaluation," September 1972 (OEO Clearinghouse No. 10734). The original sample was intended to be the 100 largest districts, however, U.S.O.E. did not have complete data for 20 of these districts.

59. The previous year was even worse. An HEW audit of comparability reports submitted for the 1969–70 school year by eleven school districts revealed not only that all the districts in its sample were non-comparable, but more importantly, it found that the comparability reports submitted by these districts contained data which was frequently "unreliable," "unverifiable," "invalid," "misleading" and even "inaccurate." Curiously, the HEW report, though printed in final form in early fall 1972, was never officially released to the public.

60. R. Stephen Browning and Daniel Badger, "Title I Comparability: One Year Later," July 1973 (OEO Clearinghouse No. 10733).

61. 45 C.F.R. Sec. 116.26(b) (7), June 28, 1973.

62. 45 C.F.R. Sec. 116.26, June 28, 1973. For a more complete discussion of the June 1973 regulations and their impacts, *see*, Browning and Badger, *op. cit.*

63. Browning and Badger, *Ibid.*

64. A word is necessary here about the two samples used in this comparison. The sample used in the September 1972 study contained reports from 80 school districts, many of which used 1969–70 data. The second sample contained comparability reports from 112 districts taken from a U.S.O.E. survey. All reports in the second sample were based on either the 1970–71 or 1971–72 school year.

65. In Table I, note that Florida, Idaho, Illinois, Minnesota and Oregon never submitted the required September summaries and are therefore not included in the totals.

66. A U.S.O.E. analysis of 332 district reports from the stratified sample found 50 of these reports (15%) to be unacceptable. The most common reason was failure to comply with the salaries per pupil ratio (24 districts) followed by the pupil/teacher ratio (17 districts). However, 13 districts made computational errors which affected their comparability status.

67. The same U.S.O.E. study also analyzed 137 revised reports and found 69 (50%) to be unacceptable. Surprisingly, the reason for nearly half of these inadequacies was that the revised reports were actually submitted showing Title I schools as non-comparable. Other reasons included computational errors which affected their comparability status.

68. Alaska, Hawaii, Idaho, Illinois, Massachusetts, New Jersey and Washington have, as yet, failed to submit the required January summary. Idaho and Illinois have yet to send in either the September or January summary forms. *Note:* Summaries submitted after March 1, 1974, if any, are not included in the Tables.

69. Note that there is a difference of 1,424 districts between the 4,805 districts which the states listed as required to submit comparability reports on their September summaries and the 3,381 listed in January. This is due in part to the fact that districts which allocate Title I funds to all schools or which have only one school per grade span are exempt from filing comparability reports. Since both compliance and record keeping were so poor prior to the new regulations, states had no idea how many districts fell into these exempt categories. Thus, the January summary may reflect a more accurate expression of the actual number of reports required. Some of this difference might also be attributed to an ambiguity in the wording of the January form which might have led a few states to include only the number of districts on the stratified sample in this column rather than the total number of reports required.

70. The form (U.S.O.E. #4524, 8/73) used for the September 15 summary requests in question six that each district be listed "whose applications have not been approved as of September 15, pending submission of revised reports." The other questions on the form were: 1) Total number of LEA's that participated in Title I programs during school year 1972-73; 2) Number of LEA's (in item 1) required to submit reports on comparability (based on 1973 data) when requesting funds for fiscal 1974; 3) Number of LEA's (in item 2) that actually reported as of September 15, 1973; 4) Number of LEA's (in item 3) required to take corrective action and submit projected revised comparability reports as of the beginning of the 1973-74 school year; 5) Number of LEA's (in item 4) that actually submitted revised comparability reports as of September 15, 1973.

71. Texas, on the other hand, does account for 27 districts that submitted late forms, giving the date each was received. It should also be noted that discrepancies in states other than those mentioned are considerably less.

72. For example, California lists 61 districts under the heading of "applications not approved." Judging from past practices it is unrealistic to assume that funds were withheld or were not supplied retroactively to these districts. (But *see*, note 73, *infra* regarding the January 1 summaries.)

73. These figures do not include the 37 districts listed in the Wisconsin 4524 form under the "funds withheld" heading. A phone conversation with Wisconsin officials indicated that funds *had* actually been terminated for these districts until the proper forms had been submitted and had not been resumed retroactively. It is curious to find a state agency that follows the regulations closely and yet has so many delinquent districts. Is Wisconsin an aberration or is it rather, an indicator of what more states would look like if the regulations were equally well enforced?

74. These states were Connecticut, South Carolina, Texas and Wisconsin.

75. In addition to recalculating pupil/teacher, aries/pupil and other costs/pupil for both project oots and non-project averages from the figures on the ort, Lambda also regrouped schools by grade span if roper grouping were used in the reports. It should be ed that "discrepancies" were frequently, but not essarily, sufficient to result in non-comparability.

76. Lambda Corporation Report 104, *ESEA Title I nparability Reports for the End of School Year 2-73*, Volume I, "State Summaries," Volume II, strict Summaries," and Volume III, "Detailed Reports Sample Districts," January *[sic]* 1974.

77. One workable exception to this is pointed out ote 85, *infra*.

78. National School Public Relations Assn., *Edu- on U.S.A.*, Washington Monitor, "Title I nparability: A New Milestone?" January 14, 1974, pp. , 108.

79. For a detailed description of the current lations on comparability and an in-depth guide to stigating comparability violations, *see* generally, iel Badger, John D. Miller and Robert Silverstein, yers' Committee for Civil Rights Under Law, School nce Project, "A Manual for Enforcing Title I Compara- y," October 1973 (OEO Clearinghouse No. 10730).

80. Essentially, the formula for this computation

$$\text{register} = \frac{\text{Actual Enrollment} \times \text{Avg. No. of Subjects/Pupil}}{\text{Minimum Permissible No. of Subjects/Pupil}}$$

generally, Lawyers' Committee for Civil Rights er Law, School Finance Project, "A Preliminary mination of the Enrollment Adjustment Procedure d in the New York City Comparability Report for Its Schools," November 7, 1973 (on file at the Lawyers' mittee offices, Washington, D.C.).

81. These figures are born out by the N.Y.C. Board Education's own reports. In a publication entitled hool Profiles for Day Academic and Vocational High ools" (published annually by the Office of Program- g, Planning and Budgeting), it is reported that some demic high schools spend as much as twice the amount pupil as other academic high schools.

82. When OCR enrollments are used the figure is r to $1.5 million.

83. The published OCR data does not include time personnel. However, the actual questionnaire to the schools by OCR does ask for the number of time staff. Thus, by referring to the original question- responses, a reasonably accurate estimation of time staff can be made.

84. Actually, the number of teachers required was ably double or triple that amount. The figure of 3.5 tional teachers was calculated on the assumption that e were no teachers at Fonvielle Elementary paid from al funds (*i.e.*, that the OCR figure of 25 did not de any teachers paid from federal funds). Such an mption invariably is erroneous, especially when one is dealing with a southern elementary school with a high incidence of poverty.

85. Unfortunately, beginning with the 1973-74 school year, OCR no longer collects teacher data. In an effort to eliminate duplication of effort with other federal agencies, HEW ordered OCR to collect only pupil data. Teacher data is now collected by the Equal Employment Opportunity Commission (EEOC). The result is that OCR pupil data for October 1973 has been available for months while teacher data is as yet unavailable. EEOC is currently less efficient than OCR in both collection and dissemination. Yet, even if the difficulties of access are resolved, there are no longer any guarantees that the data will be collected at the same time or will otherwise be compatible. There is also inconvenience of continuous dependence on separate sources. In short, one of the best monitoring and enforcement tools for comparability is currently inaccessible. The implications of this, however, are even more far-reaching. One of the monitoring possibilities for the future discussed by the Lambda Corporation is to superimpose the OCR data base over the comparability report data, thus providing an automated check of pupil and teacher statistics entered on comparability forms. However, unless this data is made available at roughly the same time as the comparability reports, it would not be possible to enter the data in time for a useful check. The current division in responsibility for data collection makes such coordination rather unlikely.

86. The regulations require that salaries less longevity, *and* longevity salaries be included for each Title I school and the averages of these two figures for the non-project schools. The number of non-Title I schools is also required. By adding these figures together for the Title I schools and multiplying the non-Title I sum by the number of non-Title schools, a total salaries figure for the report can be calculated for comparison with the budget. Essential to this comparison is the inclusion of longevity salaries. The December 1 comparability forms (O.E. #4560-1) request longevity salaries only from districts in the national sample, virtually foreclosing salary, and therefore dollar per pupil comparisons in most districts. (Note also that it was not until December 1, 1973 that any district in Alabama supplied longevity information.)

87. Memorandum, Department of Health, Education and Welfare, from the Assistant Secretary for Planning and Evaluation, "Title I Comparability–Enforcement and Disincentive Issues," December 6, 1973, Attachment A, p. 7; on file with the Lawyers' Committee for Civil Rights Under Law.

88. House of Representatives Report #93-805, "Elementary and Secondary Education Amendments of 1974," the Committee on Education and Labor Report accompanying HR 69, February 21, 1974, pp. 121-122.

89. Committee Report, *op. cit.*, p. 9.

90. Ibid. p. 11.

91. Ibid., p. 227.

92. The reader is asked here to recall the legal requirements established by *U.S. v. Frazer*; see note 57, *supra*.

THE EQUALLY GOOD OFF, THE EQUALLY BAD OFF

by Thomas J. Cottle

Ever since I met them, I have thought of them as a pair. Perhaps it is their physical appearance, their age or their goals, or the way our respective friendships have evolved that makes me see them as being somehow related.

Mitchell Walker and Edward Kelly are tall young men, strongly built, with large hands that suggest they are nowhere near finished growing. At fifteen their interests are similar, with sports and girls and school keeping them busy, and in a way, rather fulfilled. Both are attractive, popular in their schools, and interestingly too, concerned with the welfare of younger boys and girls. Both have spent time working with children in after-school programs and during the summer in day camp activities. Their involvement with children no doubt began at home where each has younger brothers and sisters. There are six children in Mitchell's family, five in Edward's. They are each the first born son, being preceded by a sister. Only now are they getting close to these older sisters whom they see as possessing valuable information about girls in general, and about some special girls in particular.

Among the similarities, however, loom some profound differences. Mitchell's family lives in a section of Boston that some call working class; in fact the families in this neighborhood are poor. His parents have known many years of illness, and although they are in their middle forties, their capacity for work has been reduced by disease. Mr. Walker is employed as a part time bookkeeper in a small trucking firm. Mrs. Walker occasionally helps out in the kitchen of a downtown Boston hotel. Mitchell and his older sister Sally have taken part-time jobs, but their parents worry that their school work has been affected by these additional responsibilities. The children insist that contributing money to the family is more important than their education and besides, they aren't slighting their school work all that much. Actually their grades dropped noticeably when they began working three years ago. Sally Walker hopes to finish high school. Once she thought of becoming a nurse, but recently that idea has disappeared. Mitchell wants to go to college. He feels he has a chance. His presence at college, he believes, would encourage his younger brothers and sisters to study.

For Edward Kelly the matter of money has never been a problem. Since the time he was ten he has wanted to work, but there has never been a serious need for him to gain employment. His father Edward Kelly, Senior, an attorney with a large Boston firm, has worked his way from what he calls "humble beginnings" to a handsome house in a wealthy suburb. Mrs. Kelly was for several years a secretary in the firm her husband entered upon graduating from law school twenty years ago. She thinks of taking a job now and again, but at present is satisfied in her role as mother to five children and wife to a man she feels has not yet attained the stature he deserves. She speaks of moving to a larger home in a suburb even farther out ten years from now. Perhaps when the last child graduates from grammar school to high school, the Kelly's will take this next step. In the meantime, their present suburban home and rustic New Hampshire cabin which they use during the summer suits her well enough.

There is little doubt among the senior Kellys

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at their children will go to college. Young Ed has s eye on Ivy League schools and thinks that his cademic record combined with his athletic ilities will earn him a place in a fine school. He eaks about the matter regularly with his father nd is well aware of the financial burden of having vo children in college at the same time. His father as advised him to apply for an athletic scholar-ip since any money he might bring in would elp. Both parents feel Ed should work during the mmers and save the money for personal penses at college. He is doing exactly that. One ternoon a week and two months in the summer e works as a general assistant and delivery boy in local pharmacy. The work has started him inking about a possible career in medicine, quite change from years ago when it seemed natural at he would follow his father into law.

"I think alot about my future," he has said, even though I've got a couple of years left of high hool. But these days you have to think about it. here's so much competition that you can wreck our chances when you're as young as I am. I've ready sent away for college catalogues. Last eek a group of us went into Boston to the library work on term papers for English. I was looking ound in their shelves and I saw they had *all* the talogues. That's all I read for three hours. I saw ot of West Coast schools that really look good o. Up to now I was thinking of staying around ere, but I'm not so sure anymore.

"I'm in a pretty good position out here. verybody expects you to do good. I mean, ey're pretty shocked when kids like me don't do ell, don't go to college, you know. Like all these ds who take drugs? That surprises alot of people. verybody reads in the papers about the suburbs, eople getting divorced and all the rich kids on ugs, but at school everybody's expecting us to smart. I'm not talking about the kids in the ottom tracks. I'm talking about kids in the llege "prep" programs. 'Course the honor kids, ere's no way they're going to fail. But my oup's the one that has to fight it out. We're not e top of the top. We'll get in, you know, but e're not going to get our first choice. That's why m counting on basketball and baseball. The idance counselor told me that alot of the really od schools like to hide their interest in athletics, t they need us. He said if I get B's I'll probably t into an Ivy League school. 'Course, making All League one of these years wouldn't hurt any.

"Must sound strange hearing me talk like this, huh? Some guys I know, they're taking their life easy. They just go along not letting anybody see what's bothering them. But I talk to my folks more than alot of guys do. My dad's really taught me alot. Like, how a man's really got to work, and if he does how the rewards come. I saw where he grew up. Man, you can't believe a guy could accomplish so much, and what the heck, he's only forty-something now. He could still get a whole lot more. 'Course it's not the same for me since I'm starting off way better than him. But still, I'd hate to see my life be nothing more than throwing away lots of good chances. Some guys don't care. They know their old man is loaded so they keep on spending it. But I see how he has to work for it so I've got a better sense of what money's all about. I'm not going to be any failure. Too many people are counting on me. Not only in my family, but at school too. Later on in life, like my dad always says, there are people waiting around, watching you, hoping maybe that you'll fail. But right now, it's like this whole town is out to make life good for us. I don't mean school's that great. It could be a whole lot better, but they sure want us to go to college. Anybody who doubts that hasn't been around here too long, I can tell you that.

"There's something else about the school too that's pretty good. Lots of the teachers spend time talking about places where kids are growing up. Not kids like us, I mean, poor kids. Some of them are black but not all. Lots of these kids are just as smart as anyone out here. They could be doing just as good as anyone of us and getting ready to go to college, except they don't have the opportunities we have. That's about the only difference between us. Our fathers have money but their fathers don't. It's not their fault. It all comes down to just where you were born.

"That's the funny part, like we were talking about yesterday in social studies. Mr. Hamblin told us to imagine how our lives would be five, ten years from now. We wrote these papers for him and then talked about them. Everybody was a success. College and jobs, and people making money and getting married and taking trips. We really sounded like we were big shots. But then we talked about competition for the *best* schools and the *best* jobs and everybody started to laugh a

little, you know. But the interesting thing was how all that competing came about because we were born pretty well off. Those kids who go to school in Boston, lots of them are going to compete with each other the same way as us, but the chances just aren't there. Some of those kids, even the ones who do the best, won't be as well off in the end as some of us who do lousy. Boy, if that's the way it worked in sports, trying out for a team and making it but still, you know, not making it, I'd be just as angry as those kids probably are."

Mitchell Walker lives among those "other kids." He is very much aware of the world where Ed Kelly lives. He speaks about it, even follows it as one might follow the progress of a baseball team, but recognizes that the opportunities "out there," fifteen miles away, will never befall him. College is a dream. There is a chance, although it fluctuates from month to month, and the possibility of the career that might ensue from it seems even more vague. The idea of becoming a doctor stays alive in the mind of this young man, but he is careful about telling the dream to certain people. Some laugh at him, others look at him with pride. His father always says, "We'll just have to wait and see," as if he were afraid that his response might spoil his son's chances.

Mitchell receives little encouragement at school. The two guidance counselors work mainly with the seniors; the athletic coaches tell the boys that thinking of the future is fine, but nothing substitutes for good old everyday work. According to Mitchell, the administration seems concerned only with making certain students behave. And as for the teachers, they have taken an interest in Mitchell, but he wonders whether they have picked him out, along with several other students, because he is charming and speaks well. He is not convinced they believe in his intelligence. Few take his medical school dream seriously.

"I can't always be sure what they're saying when they tell me to stop worrying about the future," he said once. "Maybe it's good advice. If you worry too much about the future you won't get tonight's homework done. But sometimes I think they're trying to tell me to forget it. I think what they'd like to say is that the old Walker kid doesn't have the smarts to make it. I got the smarts all right, the question is, is there a college I can get into? I could always go to some junior college or a community college somewhere, but from what I hear you kind of pass through those places and come out the other end looking like you did when you went in. And anyway, there's always the money problem. That's the root of all the evil, right?

"What happens, say, if I do get in and we can't get the money to let me go? I'd have to keep working 'cause it isn't going to get any better at home. My father's pretty sick already. He'll be earning a whole lot less by the time I'd be ready to go. So maybe if I went to college it would only make him feel worse. You know what I mean? Maybe he'd feel pressured to work harder so I could get through, and maybe that extra work would kill him. Or my mother too. Even if I go to school around here it ends up costing alot of money. And you can't work too much, otherwise your grades fall down. I've already seen that happen.

"Hell, you'd think my school would help, but they only care about the real smart kids. They just want to pass the rest of us and not have any trouble. If you're a real brain they treat you special. But if you're like me, not all that smart, you know, but willing to make it up with alot of work, they don't care as much. They tell us hard work's the best thing, but I see the way they treat us. You got to be born smart before the teachers care about you. Like the coaches, they talk about how we should be scholars as well as athletes. But they don't ever talk to us about school. All they worry about is that we might flunk something and be ineligible or something like that. Don't get me wrong. Sports are maybe the most important thing in my life, but sometimes when you hear those guys talk, you forget you're in a school. They act like we were professionals or something. Going on to college, or what we're going to do with our lives, they couldn't care less. Oh yeah, going to college might matter to them 'cause if any of us get famous they get some of the glory. You know, Mitchell Walker's high school basketball coach was none other than Arnold Kuyper. That's what old Kuyper really wants too.

"I'll tell you another thing about sports. You remember I said I didn't think lots of people in the school really wanted to help some of us non-brains get into college? Well, there are kids like that too. Like, I have friends who don't want me to study. They think all we should do is mess around. They know they aren't going to get much

out of school; they always tell me I'm wasting my ime trying. They probably think they're doing the best thing for me, but they're only making it tougher. Lot of kids, you know, they stop liking you if you start doing better in school than they think you're supposed to be doing. Like, they'll say, 'ain't we good enough for you no more, man?' They put the choice to you: stick with them, which means be the way they are, or leave. But I don't want to leave them. You can't be friends with alot of people, especially around here. Like, the black kids aren't friendly with us, except some of the ones we play ball with. And the brains, they aren't about to let people like me in. So I've got my friends. I have to stay tight with them. I don't want to be alone, all by myself. My brothers got their friends and I got mine, only some of mine have a narrow way of seeing the world.

"It puts me in a strange position, though. I can't leave them, and I can't get myself to believe that school doesn't matter. I'm afraid to tell people around here when I like a subject. Like, I think social studies is all right. I don't mind reading the books she gives us. I don't even mind preparing for the tests, and they give us alot of tests too. But I don't let anybody know this. I make believe everything sucks so the kids my age won't dump on me. There are other kids like me, but we're a minority. I don't even tell the teachers I like it. They'd think I'm just sucking up to them. And you couldn't prove too much with my grades.

"The way I see it, those kids are just acting the way the school wants them to act. If you're really smart, everyone helps you to get smarter. But everyone knows there are lots of kids who aren't smart. Just to make sure they give us tests. Then they divide us up into the real smart, the not smart and the retarded kids. But those kids don't count since they're, like, sick in a way. Then they work real hard to get the best out of the smart kids, like they were athletes, and forget the really dumb kids, which leaves us. We're their problem. We aren't brains, but we also aren't ready for a hospital. So, what can they do? The best thing is to make sure we don't give them any trouble, so they teach us, kind of, not to like school and not to want to go to college. Vocational school is what they want us to do. The brains go to college and we're supposed to learn how to fix cars. And the girls go to cooking and nursing classes, things like that. Everytime someone like me wants to go to college it's like it messes up their plans. When we get older they'll tell us don't apply to college, but some of us do anyway. We know some older kids who tell us what we have to do to apply. But now, the teachers are happy if we pass. They don't want anything for us. They're even worse on the black kids, which isn't fair, 'cause those kids, you know, they got it worse than we do.

"Then on the other end you got all those fancy kids going to school in the suburbs. They can't fail. There's no way their schools are going to let them fail. If they have to, they'll drag every kid out there into college even if the kid doesn't want to go. 'I don't want to go. I don't want to go,' the kid will be crying. 'You're going, kid!' the school will say. 'You're going. What do you think all this money we've been spending on you has been for?'

"They have it all right out there. I mean, it's no paradise with all those people drinking all the time, and the kids messing around with drugs 'cause they don't have anything else to do. You don't hear alot about that. It's always *our* school that's supposed to be filled with heads and drinkers. But they got their share out there too. They got plenty of sickness out there. But see, it doesn't matter in the long run 'cause the whole damn community can help those kids. First off, they got more money than they do around here. If you read those figures about how much those communities spend on each student, it's no wonder they got swimming pools and these great big gyms, while all we got are buildings that would probably fall over if people made enough noise. You bang your locker too loud and a wall falls over.

"But they got everybody organized to where they're protecting the students. Not just in school but all over the town. Say, like, we see a policeman walking around. You know that guy's going to bust you, he doesn't care that you're a student. You break a law, you're just another criminal to him. What's he care? He earns more than your old man, and he's got superiors telling him to look for crime and track it down. So there he is prowling around in the bathrooms, in the girls' bathrooms too, like some dog. Sniffing around, you know, like we were running the big crime syndicates right here in the school. I'll tell you, man, I see those guys and I go the other way. All they have to do is pick me up once, even if it turns out to be a mistake, and I'm through. I'll go

to college with some correspondence course in the penitentiary. They're looking for us to do something, you know what I mean? You ask the black kids. They'll tell you everything you want to know about the police and how the administration, instead of cutting down the number of cops, keeps telling us we need more of them.

"Out there, though, in the fancy schools, the police are supposed to help the kids. They're not going around hoping they can arrest somebody. They're trying to help. They better too, since the people out there have just about hired them to do it. Our families don't have any power like those families do. One yell and we go to court. Those kids get away with alot more. Hell, the way they have it set up, police pick you up and drag you off to college. They don't mix the students up with the criminals. Maybe that's why they don't throw them in jail out there.

"Rich kids got their problems. They got pressure on them, but they don't know how good they got it. When one thing falls down they've got something else. If their family falls apart, they got their school. If they do bad in school, they got their friends. If their friends leave them, like I was saying before, well, at least the homes are pretty. Here, when things go they really go. You start out bad, you end up bad. If you're family breaks up, all you got are lousy schools and no place to go where you can get yourself together. It's like we're in jail over here. They don't even have to put us in jail; we're already in there. Classrooms are jail, cafeterias are too. And the halls, man, they really are jail. You talk too loud and they send you off to see the warden. They're looking for us to make mistakes. The teachers, the principals, the cops, they got their eyes on us. If I told a cop I was going to college, he'd say, 'Who you trying to kid? You're only a dumb punk.'

"That's the difference between the kids here and the kids in those fancy schools in the country. They don't have punks out there. All the punks go here. You never even hear the word punk out there. They got kids who accidentally misbehave, but no one over there is a punk. You got to be poor to be a punk. I'll bet even if I go to college, and then medical school after that, people will still call me a punk. 'Hey, Doctor Punk, come over here and look at my kid's broken face.'

"Everybody goes around telling us about how great America is. I want to believe them all right, but when they start shoving that stuff about people being equal I'd like to cram it down their throats. No two people in the world are equal. My old man sure isn't equal to any old man in the suburbs. Even if a guy there was sick like my old man, they'd never be equal. That guy would have insurance. He'd find a high paying job. Hell, he could probably find a job that would pay as much in one day as both my folks and me and my sister put together earn in a week. They got the schools, they got the cops, they got all the good jobs, they got all the good streets, they got everything that's good. And everything they left behind, that's what we got. You ever wonder how come they don't send their kids to our schools?

"What gets me is that they have it so good there's no way one of their kids is going to end up here. And they fix it so none of us kids get to go there, unless we marry one of them. The way I see it, my education is only a ticket out of here. If it's really good, I'll take my whole family with me. If not, I'll go by myself. Maybe go find a rich girl. When I was a kid, I thought the most important thing was to stay around here and help my folks. But when I see what those fancy neighborhoods got, I tell myself, *I* come first. The first thing is to get *me* out of here. I won't end up anywhere if I stay here, but here. And here is nowhere, man. Here is nothing. It's just hanging around getting ready to get yourself a crumby job and a wife so you can have lots of children so they can go to the same crumby school you went to so they can hang around going nowhere. Then everybody will talk about me like I talk about my old man. Him, me and my kids, all those years and nobody's moved more than ten blocks.

"And they go around in our school telling us people are equal. They're right. All of us living here are equally bad off. That's what they really ought to be telling us. We're all equally bad off and the kids out there are equally good off. I guess they figure that us being equally bad off and them being equally good off makes everybody equal. Seems to me they better count again."

EDUCATION for INSTITUTIONALIZED CHILDREN

by Theodore E. Lauer

A basic tenet held by our society is that the te has an obligation to provide free public ucation for all children, generally beginning at e six and continuing until they complete sec- dary school. The state has undertaken this duty o ensure that all...future citizens are given the portunity of acquiring that degree of educ.tion ich will enable them to make an intelligent cision as to their own capacities or potentialities d provide the basis for the knowledge and cipline needed for active participation in the rk and collective decisions of the com- unity."[1] Conversely, the state has undertaken to mpel children to attend school during all or ost of those years, either by requiring that the ildren themselves attend or that their parents nd them.

A child's social deviance may result in nporary or long-term loss of liberty through nfinement in a custodial institution operated by e state or a political subdivision. While some ildren are institutionalized because they lack oper parental nurture and protection, most are nfined because of acts in violation of law or ndencies toward unruliness or incorrigibility. e legal basis for confinement of children is not nishment for deviant conduct as is usually the se with adults, but is treatment and rehabil- tion to ensure that the child will not repeat his viance and will ultimately become a functional ult citizen. Through the instrumentality of the enile justice system, the child is compelled to change his liberty for custodial rehabilitative atment.

When a child is confined in a custodial institution, even temporarily, there is an interruption in his extra-institutional schooling. Institutionalization of a child, however, does not relieve the state of its duty to provide education. Rather, because the very purpose of institutionalization is to afford needed rehabilitative treatment, it would follow that the state has assumed an *added* obligation to provide a more particularized and intense educational experience to meet the individual needs of the confined child.[2]

The need for education within custodial institutions is further intensified because the child who is institutionalized is almost invariably education-poor. He is likely to have experienced serious difficulties in school which, whether causal or symptomatic of the condition or act which led to confinement, must be dealt with and if possible ameliorated or cured. Consequently, it is not enough simply to duplicate within institutional confinement the educational mechanisms whose failure coincided with the causes for the child's loss of liberty. More is necessary.

How well is this need being met? In determining whether the state is fulfilling its obligation to educate children in confinement, it is important to recognize that there are different purposes for confinement and great disparities in its duration which directly affect the kind of educational program needed.

Immediately following apprehension and prior to a juvenile court hearing to determine delinquency or need for supervision, the child is often held for a relatively short period in a detention center or jail. The justification for this detention is that it will ensure the child's presence to respond to the charge against him or, more probably, that the child is seen as a menace to himself or others. (Children are commonly sub-

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jected to preventive detention, although its proposed use for adults has been severely criticized on constitutional grounds.) After the court hearing the child may be committed to a custodial institution for juveniles, usually denominated a state training school. Training school commitment is generally for an indeterminate term. It lasts at least several months and may extend through the child's minority. For the most part, children are committed to training schools only for relatively serious offenses or for repeated minor offenses. Finally, some children are committed to adult prisons, either directly by the courts or following transfer from a juvenile training school. Different educational problems are presented by each type of confinement institution.

Jails and Detention Centers

On any given day there are probably about 20,000 children confined in the nation's jails and detention centers. In spite of the recognized desirability of segregating detained children from adult offenders, perhaps half of these children are confined in county or municipal jails, while the other half are in juvenile detention centers.[4] These children remain confined for periods ranging from a few hours to many weeks. For the most part, children are held in jails or detention centers because of charges of delinquency or need of supervision, but some are held for other reasons including parental neglect.

An extremely wide range of conditions exists in jails and juvenile detention centers. While some metropolitan areas boast large new facilities designed exclusively for the temporary detention of children, many local jails used to detain children were constructed in the nineteenth century and were designed only to store prisoners in barred cages. Adult jail conditions are typically inhumane, but detention centers may also be operated in a manner wholly unfit for children.[5] Both jails and juvenile detention centers are grossly overused, through confinement of many children without adequate cause and through detention of children for overlong periods, sometimes up to six months.

Few if any facilities for temporary confinement of children possess adequate educational programs. In local jails, children are subjected to the same regime as are adult prisoners and there simply is no educational program of any sort. This is partly because jail detention is viewed as a temporary measure and because small jails seemingly do not have the resources or the constant child population to make an educational program practicable. But principally, inadequate local jail conditions are attributable to public and official apathy over the plight of jailed children and to an extreme poverty of constructive thought as to the needs of child inmates or how those needs may be satisfied. People simply do not care.

Specialized Detention Centers

Unfortunately, the existence of specialized detention centers for juveniles does not guarantee adequate educational programs. Here, too, there is apathy and poverty of thought. The problem of providing a meaningful or beneficial educational program appears insuperable because children are short-term inmates; because it would be difficult to identify and meet the particularized educational needs of those children; because resources are minimal; and because coordination of the detention center program with that of the school currently or most recently attended by the child requires commitment and effort. The result is that children are warehoused in these facilities to await court action. The activities for children are largely designed to pass the time easily without permitting psychological pressures to build to an intolerable degree.

One threshold problem exists concerning "adequate" education to meet the demonstrated "needs" of children in detention. While it may be agreed that the compulsory education law applies to children in detention and that the assumption of custody of a child carries with it the obligation to assure that required education is received, it is questionable whether any greater treatment may be imposed upon a child in detention before the court has determined whether, under the juvenile code, a need for treatment exists. If there is a presumption of innocence prior to conviction in the adult criminal system, likewise there should be a presumption of freedom from the need to be treated prior to a juvenile court adjudication. Pre-judgment treatment for the child's specific "needs" is no more proper than pre-conviction punishment of an adult.

Thus, the ordinary needs of the child *qua*

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child including routine education, recreation, medical care, food, shelter and clothing may—indeed should—be met. But the state may go no further until it is judicially determined that the child's acts or condition have brought him within the juvenile code, and that a need for treatment exists. A necessary corollary to the child's right to receive treatment when the need is shown is the right not to have treatment *before* the need is established.

Given this limitation, however, it does not follow that the child in detention should not receive education, or even that innovative means unknown to the public school system may not be employed to this end. The child who has had difficulty in school probably cannot be successfully educated if traditional school methods are employed; these have already failed. Something different is needed. As the National Council on Crime and Delinquency has stated, "The cost of the detention school is justified if a child gains a sense of achievement from one constructive thing learned there, or if his own school learns of one educational area through which he can be reached."[6]

While it has been recommended that the detention school program be administered by the local public school system,[7] there are drawbacks to this approach. First, detention education will generally be a low-priority item for a school district, with the result that only a second-rate effort is likely to be made. Second, there must be some showing that the philosophy and methodology of the local school system will not merely be transplanted from the classroom, where it has already failed with the detained child, to the detention center. A better solution would be to employ special teachers and other special personnel for the detention center.

Although detention center education should not duplicate the local school program, some measure of coordination is necessary. Otherwise the child who is released from detention will find that his school problems have been exacerbated by his incarceration: not only must he return to a school which he dreads and which has proved inadequate for his needs, but he must return to find himself weeks or months behind in regular school work. A firm foundation for future educational difficulties is thus laid, and continued educational failure is assured.

It is clear that only a juvenile detention

Photo by Deborah Feingold

center which is competently staffed and adequately funded can even begin to provide an innovative educational program in which children are dealt with as individuals in a fashion responsive to their interests. Such a program cannot be conducted in a local jail or lock-up, and indeed cannot be conducted in many juvenile detention centers as now operated.

Should Policy Change?

A solution might be found by pouring hundreds of millions of dollars into the construction and staffing of a network of juvenile detention centers across the country. A more rational solution lies in another direction: drastically reducing both the number of children detained and the length of time they are held. Initially, detention might be reduced by as much as seventy-five percent through a revision of detention policy to provide for confinement of children only when clearly necessary. Firm detention guidelines are essential. The vast majority of children can safely be returned to their homes rather than incarcerated. Further, a strict limit should be imposed upon the length of time a child can be detained. Most juvenile court hearings can be held within a week or ten days with no serious inconvenience to

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any party. Therefore, no child should be detained longer than fifteen days under any circumstances. Reducing the number of children held and the length of time in detention will also facilitate adequate educational programs for those children who do require temporary placement in detention centers.

Training Schools

In theory, the training school should be a total educational experience aimed at imparting basic skills, vocational skills and the understanding necessary to live in modern society. While statutes creating training schools are notoriously vague concerning the kind and nature of educational experience to be afforded, there seems to be consensus that the underlying purpose of the training school is educational, to teach "the child something about himself and the world about him, and how he may relate himself to that world."[8] The purpose of a child's confinement is to make possible a total "therapeutic milieu"[9] in which all aspects of the child's life may be organized toward the rehabilitative goal.

Some of the difficulties of providing education within the training school were succinctly stated a quarter-century ago by Paul W. Tappan:

> In its formal academic training, these children's institutions operate under a dual disadvantage: the children themselves have been badly unadjusted and antagonistic in their ordinary school experience in a high proportion of cases and a majority (about three-fourths) are retarded in grade, some of them because of mental defect. In addition the educators in these institutions are themselves somewhat less capable and less well adjusted on the average than are teachers on the outside. There is the further difficulty that the children enter and leave the institutional classes at irregular intervals through the year. As a result of these handicaps, the training school rarely succeeds in overcoming the dislike for education that children have brought with them.[10]

But Tappan describes only a part of the difficulties which affect training schools today. The fundamental problem may be the notion of the training school itself: bringing together a large number of problem children and dealing with them in relative isolation, separate and apart from "normal" society and "normal" children. Even if all of the children confined in a training school had identical educational needs, identical capacities to absorb education and identical attitudes toward schooling, their group education would be a formidable task. Given the fact that training school inmates have tremendously disparate problems and needs, the task of providing an adequate educational program for all or even for any one of them becomes well-nigh insuperable. The public schools, dealing with only a portion of the child's life, experience far less than total success with the homogeneous approach to education which large numbers seem to dictate; such an approach in training schools would appear almost foreordained to disaster.

In view of this problem many training schools conceive as their objective the "socialization" or "adjustment" of the child, claiming success in the outward appearance of conformity. They aim at behavior modification through simple rewards and punishments, through application of token rewards, point systems and similar machinations. But even within the training school it is difficult to characterize these devices as other than deceitful manipulation, which in turn calls for like manipulation from the child-subject.[11] Outside the institution these simple mechanisms do not exist, and the conditioned child is thrown back upon his own impoverished resources, often with disastrous results.

The fact that the *raison d'etre* of the training school has not been successfully expressed or developed results in conflict and uncertainty in the school's operation. Loose rhetoric abounds. There is much use of such terms as "resocialization," "socialization" or "redirecting young lives," evidencing the conviction that it is better to mouth vague generalities than to have nothing to express at all. The effect of this vacuum is only to make way for the traditional conception of the training school as a penal institution for children in which repression and punishment are the fundamentally ordained aspect of institutional life for personnel and inmates alike. One result is that many training schools are organized upon a quasi-military model.

Tappan's statement as to the general inferi-

of training school educators is borne out by nt-day observations. While training school ers must meet the standards of other teach- ften they do so only minimally, although to rm their function they need qualifications cending those of regular school teachers. In places they are underpaid as contrasted with teachers. The position itself is not highly ded by the teachers themselves; only those nally qualified or abnormally dedicated re- in the training school, while others escape community school systems as promptly as ble. Moreover, there seem to be a disproportionate number of training school teachers who are led individuals and really not fitted to rm the tasks allocated to them.

Academic education is not always taken sly by the training schools themselves. Thus, mber of children participate in the school am for only part of the day, or are excused ly, on the ground that they have the capacity erate formal education only minimally or not In states where compulsory school attendance ds only to age sixteen, it is not unknown for ng schools to permit children over sixteen to e not to continue in the academic education am. Some are actively encouraged not to ipate. The theory seems to be that since a of sixteen in the general population would e compelled by law to continue in school, the ng school should not impose any greater ement. It is amply clear, however, that lly all training school inmates suffer severe mic deficiency, and that almost invariably r education will be necessary if they are to minimum proficiency in reading and other skills. Lacking this, they will remain educa- cripples for the duration of their lives.

While at least one program has been devised ut formal education,[12] commonly training s have an academic educational curriculum ned after "the same basic courses normally d in their community school." Underlying pproach is a simplistic rationale: since the has failed in the public schools, what he es is more of the same! The effect is to uate the failure. The opportunity for in- on is wasted; children are locked into the ystem which was the situs of their original essful effort—an effort rendered unsuccess- her by the failure of the child to accommodate to the system or the failure of the system to meet the needs and interests of the child. If anything is evident concerning the shape and content which training school education must take, it is that it must represent a departure from the traditional curriculum of the public school.

Most training schools place work programs, which they may also term "vocational education," high among institutional priorities. A strong argument can be made for encouraging training which will enable a child to earn a livelihood and to gain whatever satisfaction productive employment can give. But training school work programs and vocational education are conceptually unsound and outdated and therefore largely foredoomed to failure. More emphasis has traditionally been placed upon making the training school self-sufficient—thereby saving public money—than upon the educational or rehabilitative returns from such programs. Thus the work activities of children in training schools are largely related to institutional subsistence and many children are employed for long hours in the kitchen or laundry.

In many schools the main thrust may still be agricultural, as it has since the founding of training schools a century ago. The predominance of agricultural activity can be laid both to the desire to produce food for school consumption and, perhaps more significant to the nineteenth century mind, to the ideal of the rural community where children can be removed and protected from the deleterious influences of urban life. Thus, rather than prepare the child for his ultimate return to city conditions, the training school has exposed him to the rudiments of a way of life which has all but vanished.

Agricultural orientation apart, other vocational training programs suffer from obsolescence and impoverishment. Thus, technical skills are taught using outmoded equipment; the skills learned may themselves be outmoded. (One recalls seeing the shoe machinery used at a midwestern training school, machinery discarded by a shoe factory many years before. The teacher pointed to a more "modern" machine but stated sadly that because of a broken part it had not been functional for over a year.) The picture is a dismal one and reinforces the feeling that institutional mediocrity and administrative sloth alone cannot account for these conditions, but a deliberate effort must be in progress to prevent the children

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from acquiring skills which could aid them to escape their otherwise assured futures as unskilled laborers in the work force. It is as if the state has determined that the delinquent or wayward child is not to be "rewarded" by affording him the learning which will enable him to become more than a marginal member of society.

Granted that education of children in training schools is at best an arduous task, and that a high percentage of the children will initially do their best to frustrate efforts to educate them, nevertheless the task is insuperable only if approached in the manner presently employed. Improvement of the system will depend upon three factors: first, a clearer understanding of what it is that training schools are seeking to accomplish, which requires a rethinking of "delinquency" and "rehabilitation" and a willingness to discard present misconceptions; second, development of research capability so that we may know more about the children training schools are called upon to work with, and more about the long and short-range effect of training school programs upon children; third, the existence of the will and determination, in terms of both philosophical and fiscal commitment, to carry it all out. We may very well discover that the training school itself is an anachronism and must be abolished.

Prisons

In spite of the touted protections of the juvenile justice system, children may find themselves imprisoned in adult penal institutions. A child may be prosecuted for and convicted of crime and sentenced to a prison when the crime charged is one over which the juvenile court has no jurisdiction—as is the case in a number of states which deny the juvenile court jurisdiction over capital offenses—or when the juvenile court has waived its jurisdiction over the child and has certified him for trial in the criminal court as an adult. Further, in New York a delinquent child of fifteen may be committed by the Family Court directly to a reformatory in which adults convicted of criminal offenses are also confined.[13] In

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states children who have been convicted of me may be transferred from training schools ult prisons on the ground of incorrigibility or ptiveness.[14]

Where a child is directly committed to an penal institution, he is generally considered rrectional officials to occupy the same status adult prisoner. Therefore he is exposed to an ational program designed principally for adult ners, a program whose overall inferiority is ally acknowledged and which is subordinated ther correctional activities, such as prison stries. Academic prison education has come ly as an afterthought in the administration of rican correctional institutions. While some nces are being made, the 1967 report of the Force on Corrections of the President's mission on Law Enforcement and Administra- of Justice reported that "in all but a few s, notably California and New York, academic uction is provided mainly by inmate teach-[15] Unfortunately there is confusion as to shape the program of academic education ld take. Generalities abound; hard facts are ingly scarce. The President's Commission was le to come to grips with the problem, and ly recommended:

> Correctional institutions should upgrade educational and vocational training programs, extending them to all inmates who can profit from them. They should experiment with special techniques such as programmed instruction.[16]

But if academic prison education is poor, tional prison education is in most respects an failure principally because society has re- d the institution of realistic vocational educa- al programs in prisons. "Prison-made" goods been rendered largely unsalable because of fear of adverse competitive effects upon ate enterprise. Nor have we been eager to cate convicts to any but the most menial and paying tasks, as though training in a skilled uit would constitute a reward rather than a shment to the offender. The prisoner, whether l or adult, is almost invariably put to a task t takes an hour to learn and a day to ter,"[17] and left at that job for the duration of imprisonment. Prison industries turn out li- e plates, mattresses, shoes, boxes, textiles. And the machinery and the technology applied are not uncommonly decades behind the times.

The educational career of the child committed to prison, if not cut short by his own truancy, has certainly been abruptly terminated by the sentence of the criminal court. His critical needs for both academic and vocational education are unlikely to be met in most American prisons today. As observed by a former convict, while it may be surprising that the rehabilitative value of education has but recently been recognized, it "is even more surprising when it is realized that education, whether academic or vocational, is the *only* form of rehabilitation going on in any U.S. prison."[18]

Right to Treatment

Is a child who has been transferred from a training school to a prison and who has never been convicted of a criminal offense likely to receive any better educational treatment in an adult prison than a child who has been directly committed following a criminal sentence? While the answer would at first seem to be that the transferred child would fare no better because he, too, would be considered as an inmate to have a status similar to that of adult prisoners, some glimmer of hope may be found in either of two sources.

First, because the jurisprudential underpinnings of confinement of children frankly rest upon rehabilitative care and treatment, the child may assert his right to treatment whether in a training school or in an adult correctional institution since the auspices of his confinement are the same. Second, the statutes permitting transfer of children from training schools to prisons may mandate a special program of rehabilitative treatment for children within the adult correctional facility. Thus in the recent decision of *O–H–v. French*[19], the Missouri Court of Appeals held that under a statute permitting such transfers and providing that transferred children be "dealt with in accordance with a program of treatment and rehabilitation to be established," it was necessary to create a new program designed to treat and rehabilitate children before any transfer could be made. Children could not be "transferred to adult penal institutions to be held on some undifferentiated basis with all regular adult inmates." It

should follow that education would be a prime component of any special program for children.

Prospect For Change

The picture of education of children confined to custodial institutions is not a bright one. Half-hearted lip service is paid to education as a valuable rehabilitative tool, yet implementation of even this feebly recognized ideal is not forthcoming. The existence of isolated innovative programs which have little hope of universal adoption only serves to contrast more starkly the tragic shortcomings of existing efforts. Before meaningful change can occur there must be a reexamination of the premises upon which institutional confinement itself is based. Outworn, irrational theories and practices must be discarded and a new philosophical and theoretical framework created. Only if we can reasonably understand why children are incarcerated and can rationally relate this incarceration to some realizable goal will it be possible to begin to prescribe the form and content of educational programs for children in confinement. Anything less is simply new gloss to further disguise existing chaos.

Footnotes

1 M. Ginsberg, *On Justice in Society*, Penguin Books, Baltimore, 1965, p. 120.

2 Affording the institutionalized child a more particularized, more intense and hence more costly education does not appear inconsistent with principles of social justice. *See, e.g.*, John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, Mass., 1971, pp. 100–101.

3 Detention may also be an illegal application of "shock therapy" premised upon the notion that it will "do a child good" to get a taste of jail conditions.

4 Available figures are approximate at best and probably substantially understate the true condition. A recent comprehensive study is Sarri, "The Detention of Youth in Jails and Juvenile Detention Facilities," *Juvenile Justice*, vol. 24, no. 3, November 1973, p.2 which gives figures as 7,800 juveniles in jail on a given day in 1970 and 10,875 juveniles in detention centers on a given day in 1966. The figures do not include facilities such as local police lock-ups and "drunk tanks" which detain persons for periods of less than forty hours.

5 For jail conditions, *see, Patterson* v. *Hopkins*, 350 F. Supp 676 (N.D. Miss. 1972). Children in jails are often housed with adults in filthy cells and receive no medical examination or care, no recreation, highly restricted visitation privileges and little or no opportunity to bathe. Juvenile detention centers may be no better, confining children in solitary rooms for extended periods or subjecting them to sexual attacks. Even nondelinquent children may be so treated. *See, e.g.*, Larry Cole, *Our Children's Keepers*, Grossman Publishers, New York, 1972, pp. 101–107.

6 *Standards and Guides for the Detention of Children and Youth*, National Council on Crime and Delinquency, New York, 3d ed., 1961, p. 64.

7 *Ibid.* at 65.

8 National Conference of Superintendents of Training Schools and Reformatories, *Institutional Rehabilitation of Delinquent Youth*, Delmar Publishers, Inc., Albany, New York, 1962, p. 92.

9 Albert E. Treischman et al., *The Other 23 Hours*, Aldine Publishing Co., Chicago, 1969, pp. 1–49.

10 Paul W. Tappan, *Juvenile Delinquency*, McGraw-Hill Book Co., New York, 1949, pp. 466–467.

11 On balance, token reinforcement seems just so much hogwash. But there is little hard evidence that other approaches will be any more fruitful no matter how glowing or preposterous the claims of their proponents. *See, e.g.*, Harry Vorrath, *Positive Peer Culture*, Michigan Center for Group Studies, Lansing, Michigan, Rev. ed. 1972; Harold L. Cohen and James Filipczak, *A New Learning Environment*, Josey-Bass, Inc., San Francisco, 1971; H. Ashley Weeks, *Youthful Offenders at Highfields*, University of Michigan Press, Ann Arbor, 1958.

12 H. A. Weeks, *Youthful Offenders*, pp. 3–4.

13 N.Y. Fam. Ct. Act, Sec 758(b). The constitutionality of this section was upheld in *United States ex. rel. Murray* v. *Owens*, 465 F 2d 289 (2d Cir. 1972), a decision based upon dubious jurisprudential analysis but squarely in the mainstream of judicial decisions according children diminished standing in the law.

14 The transfer process is statutory and has been upheld in some states, *see., e.g., Wilson* v. *Coughlin*, 259 Iowa 1163, 147 N.W.2d 175 (1966) and struck down in others, *see, e.g., Boone* v. *Danforth*, 463 S.W.2d 325 (Mo. 1971). *See* also, Sheridan and Freer, *Delinquent Children in Penal Institutions*, Children's Bureau Publication No. 415–1964.

15 *Task Force Report: Corrections*, United States Government Printing Office, Washington D.C., 1967, p. 54.

16 *The Challenge of Crime in a Free Society*, The Hearst Corp., Avon Edition, New York, 1968, p. 418.

17 H. Jack Griswold et al., *An Eye for an Eye*, Simon & Schuster, Inc., Pocket Books, New York, 1971, p. 79.

18 *Ibid.* at 73.

19 504 S.W.2d 269, 14 Cr.L. 2346 (Mo. App. 1973).

Notes and Commentary

This section of Inequality in Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

RTHER FIGURES ON FEDERAL FUNDING FOR INDIAN STUDENTS

The staff of the Legal Action Support ject, a national backup center to the OEO al Services Program, has assembled social sci- e data on federal funds for Indian education ch in some respects contradict figures which eared in "The Renaissance of Indian Educa- " by Daniel M. Rosenfelt, *Inequality in Educa- #15*, November 1973, pp. 13–22. The report esents a year-long inquiry into the sources of eral funding of Indian education for the years 8 through 1971. It reveals that in fiscal year 1 about $43.9 million was spent for Indian dents in public school, or about $209 per ian pupil (based on 205,000 pupils).

The Legal Action Support Project also re- ts that the national average per pupil expendi- e from state and local sources was $795 per rage daily attendance (or $743 per ADM); the rage federal contribution was $69 (or $74 per M). This amount of federal support for Indians s far short of "substantial federal financial port," [Rosenfelt, p. 13].

The Project also challenges the published school cost and enrollment statistics cited in Rosenfelt article and reports that the true BIA al year enrollment count was 49,640 rather n their published "duplicated count" of 000. In fiscal year 1971, the BIA actually eived $105,540,000 for support of its schools, $2,183 per pupil enrolled. When room and rd costs for boarding pupils are deducted, ut $1,640 per pupil remained for support of c education in the BIA schools, a figure which be compared to current expenditures from e and local sources for support of public ools ($795).

The full report, "Federal Funding of Indian ucation: A Bureaucratic Enigma" by Susan th and Margaret Walker, is available from the al Action Support Project, Bureau of Social Science Research, 1990 M Street, N.W., Washington, D.C. 20036 for $4.00 (free to legal services attorneys).

STUDENT RIGHTS

COURT RULES ON IMPARTIALITY IN STUDENT HEARINGS

*Anonymous** v. *Winooski School District*, C.A. No. 74-86 (D. Vt., April 10, 1974).

In ruling that a student may not be suspended from school for an indeterminate period without a prior hearing before an impartial decision-maker, the Federal District Court in Vermont has disqualified the defendant school district's principal and superintendent from trying the student. The court instead directed the board of school directors of the district to preside at the hearing.

The plaintiff, a senior in high school, was informed by the principal in March that he would no longer be allowed to attend classes on the basis of alleged "implication in a recent 'drug scene.'" The superintendent subsequently informed the student's parents that he was recommending to the school board that the student be barred from classes for the remainder of the year. The court issued a preliminary injunction allowing the student to remain in school pending a hearing.

Noting that an impartial tribunal is "a basic constituent of minimum due process," the court stated:

> While ordinarily the school principal or superintendent of schools is a satisfactory decision-maker in a student suspension or expulsion case, on the particular and somewhat unique facts of this case . . . the official directly

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> involved in gathering facts and making recommendations cannot always have complete objectivity in evaluating them. Thus without impugning the motives or good faith of the principal and superintendent involved in this case, we believe the proper course on the facts before us here is to relieve these officials from any decision-making role in view of their prior direct involvement with plaintiff's case and the strong likelihood that they may be witnesses at the hearing.

Although many due process cases refer to the requirement of impartiality, this is one of the few cases to rule directly on its meaning. [*See also, Caldwell* v. *Cannady*, 340 F.Supp. 835 (N.D.Tex. 1972); *Board of Education* v. *Scott*, C.A. No. 176-814 (Cir. Ct. of Wayne County, Mich., Opin. on Counterclaim, Jan. 12, 1972) (Clearinghouse No. 7380C); and 14 *Inequality in Education* at 58-59.]

The court also noted other elements of due process required for this hearing, including notice of the specific charges, presentation of evidence supporting the charges, right to counsel, right to cross-examination and written opinion by the school board stating the basis for its decision.

Plaintiff is represented by V. Louise McCarren, Vermont Legal Aid, Inc., 192 Bank Street, Burlington, Vermont.

*The plaintiff's name has been deleted.

RIGHT TO DUE PROCESS HEARINGS IN DISCIPLINARY TRANSFERS

Jordan v. *School District of Erie, Pennsylvania*, C.A. No. 34-73 ERIE (W.D.Pa., February 5, 1974) (order and consent decree).

A court-approved consent decree now guarantees students in Erie, Pennsylvania the right to full procedural safeguards whenever it is recommended that they be transferred from one building to another. Although the harm to students caused by such transfers is often as great or greater than the harm resulting from suspensions, this is one of the few cases to address the problem. [*Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866, 880-883 (D.D.C. 1972), a landmark decision establishing the constitutional rights of handicapped children, set out a separate hearing procedure to be followed for disciplinary suspensions, exclusions and transfers. *See also, Betts* v. *Board of Education*, 466 F.2d 629 (C.A. 7, 1972) and *Board of Education* v. *Scott*, C.A. No. 176-814 (Cir. Ct. of Wayne Cty., Mich., Opin. on Counterclaim, Jan. 12, 1972 (Clearinghouse No. 7380C).]

The previous school district policy allowed a principal to transfer a student for disciplinary reasons upon the recommendation of the student's teacher. If the student was reassigned to another regular classroom within the school, the teacher in that classroom had a right to refuse him or her; if the student was reassigned to another school, that school could likewise refuse to accept. The principal could not return the student to the original classroom against the wishes of the teacher without the approval of a special committee of three teachers.

In issuing a preliminary injunction on April 24, 1973, the federal district court declared:

> The Defendants have prima facie denied the named and certain class Plaintiffs of due process of law in contravention of the Fourteenth Amendment to the United States Constitution by establishing, implementing and utilizing a procedure whereby named and certain class Plaintiffs are excluded from attendance at their respective regularly assigned public schools without prior notice of the charges against them and opportunity to controvert such charges at a hearing.

The first step in the new procedures establishes the right, following adequate notice, to an informal meeting with the principal and other staff. Student and parent are then to be informed of their right to a formal hearing and of the procedures to be followed. The hearing is before a committee of one administrator and two school employees, all from outside the student's school. All parties and their representatives have a right to present evidence and to confront and cross-examine witnesses. The parent has the right to examine the student's school records.

The student may appeal the decision of the first hearing. Notice of the right to appeal shall

ude notice of the right to legal counsel and rmation concerning the availability of legal The appeal consists of a *de novo* hearing re an impartial hearing examiner from either Bureau of Mediation or the American Arbitra- Association, to be selected jointly by the ol district and the parent and student.

At both hearings, a decision to transfer the ent must be supported by substantial evidence he whole record. If the proposed transfer is ed, all reference to the proceedings is to be nged from the student's record. A transcrip- of both hearings shall be made and be able to parent, student and their representa- . A reevaluation, subject to these provisions, is anteed to each student transferred to another ding before the adoption of the consent ee. The provisions are also applicable to any ent removed from a required class whenever e is no similar required class within the ding.

CLASSIFICATION

STATE COURT ORDERS APPROPRIATE EDUCATIONAL PROGRAMS FOR RETARDED CHILDREN

yland Association for Retarded Children v. *e of Maryland* (Equity No. 77676, decision April 9, 1974).

The Maryland Circuit Court for Baltimore nty has ruled in *Maryland Association for rded Children* v. *State of Maryland* that cle 59A and Sections 73, 99 and 106D of cle 77 of the Annotated Code of Maryland ires the State and local education authorities provide a free education to all persons een the ages of five and twenty years, and this des children with handicaps, particularly men- retarded children, regardless of how severely profoundly retarded they may be." The State t, hearing the case pursuant to the abstention r of a three judge federal court, held that cle 77 requires local educational authorities to rmine "that the educational program provided child is in fact an *educational* program and it is in fact an *appropriate* program for the ."

> The obligations referred to above cannot be discharged by referral of a child to another governmental authority or to a nonpublic school or facility if no opening in programs provided by such other agency or school or facility are available for the child and as a consequence the child cannot be enrolled but instead must wait on a waiting list for an opening.
>
> Home and hospital instruction is not an appropriate long-term educational arrangement for any child....Mental retardation, however profound, is not a "physical" condition justifying referral to home and hospital instruction in lieu of instruction in school.
>
> The practice of sending children to nonpublic schools without full funding when the public schools are unable to provide the child with a program is unlawful. If the state fails to provide full funding in any such case the local board of education is obligated to do so. When the public schools provide or arrange for the education of a child in a public institution the *educational* program must be made available without charge to the child and his parents or guardians. The state has an obligation under Article 59A and Article 23 of the Declaration of Rights to fund institutional educational programs that insure appropriate education, so that there is no discrimination against children in the institutions.

In addition, the Court ordered that all educational programs, including state operated residential facilities, must meet accreditation standards to be promulgated by the State Department of Education. "The standards must be promulgated by September 1, 1974 and compliance with the standards must be effected by September 1, 1975. It is the primary obligation of the State of Maryland to provide for such funding as may be necessary to insure compliance with the appropriate standards."

All parties to the litigation agreed that all children can be benefitted by some type of program of service, no matter how severely retarded. In an Explanatory Memorandum of Decision filed April 9, 1974, Judge John E. Raine, Jr.

held that the "education" required to be provided by state law must be broadly defined: "...education is any plan or structured program administered by competent persons that is designed to help individuals achieve their full potential....Every type of training is at least a sub-category of education." Under Maryland law, the Mental Retardation Administration must assume responsibility for appropriate educational programs where the retardation is so severe that there is no program available in the public school system. Noting that the "chief reason why the State's responsibility to the mentally retarded had not been properly discharged is inadequate funding," Judge Raine concluded: "The main thrust of the decree will be to place joint responsibility on the Mental Retardation Administration and the State Department of Education for the education of the mentally retarded, and to declare that the State of Maryland has the obligation to provide the necessary funding."

Plaintiff represented by Robert Plotkin, NLADA National Law Office, 1601 Connecticut Avenue, N.W., Washington, D.C. 20009; J. Snowden Stanley, Jr., 10 Light Street (17th Floor), Baltimore, Maryland 21202; Albert S. Barr, III, 25 South Charles Street, Baltimore, Maryland 21202; and Ralph J. Moore, Jr., 734 Fifteenth Street, N.W., Washington, D.C. 20005.

NCARC ALLEGES VIOLATION OF REHABILITATION ACT OF 1973

North Carolina Association for Retarded Children v. *State of North Carolina*, C.A. No. 3050 (E.D.N.C., filed May 19, 1972) (NCARC).

Plaintiffs' motion to amend their complaint in *NCARC* was granted on March 19, 1974. Thus the complaint challenging the exclusion of mentally retarded children from public education now includes the following count:

> That the defendants are discriminating against retarded children in violation of P.L. 93–112 of the 93rd Congress H.R. 8070 effective September 26, 1973 cited as the "Rehabilitation Act of 1973" by excluding and denying retarded children, including the plaintiffs, because of their handicaps, from participation under programs or activities receiving Federal financial assistance.

This additional federal claim should strengthen plaintiffs' position vis-a-vis defendant's motion to dismiss or abstain, and similar claims in other federal suits on behalf of handicapped persons should also reduce the risk of abstention.

Section 504 of Title V of the Act (cited in the amended jurisdictional statement in the *NCARC* complaint) specifically precludes discrimination because of handicap.

> Sec. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 7(6) defines "handicapped individual":

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to Titles I and III of this Act.

The Rehabilitation Act is described as: "An Act to replace the Vocational Rehabilitation Act, to extend and revise the authorization of grants to States for vocational rehabilitation services, with special emphasis on services to those with the most severe handicaps, to expand special Federal responsibilities and research and training programs with respect to handicapped individuals, to establish special responsibilities in the Secretary of Health, Education, and Welfare for coordination of all programs with respect to handicapped individuals within the Department of Health, Education, and Welfare, and for other purposes." For complete provisions of this Act, *see*, 1 *U.S. Cong. & Admin. News* 409 (1973).

Precedent under Section 601 of the Civil Rights Act of 1964 should enable handicapped individuals subjected to discrimination by public schools and other recipients of federal assistance

enforce non-discrimination under the Rehabilation Act in federal courts. *Cf. Lau* v. *Nichols*, ___ U.S. _____, 42 L. W. 4165 (1/21/74); *emon* v. *Bossier Parish School Board*, 240 F. upp. 709 (D.C. La 1965), *aff'd* 370 F.2d 847 (5 r. 1967), *cert. denied* 388 U.S. 911.

The United States Government has been lowed to intervene as additional plaintiffs in *CARC* and discovery has been extended through ugust 1974. The three-judge court has informally eferred ruling on the motion to dismiss or abstain ending a full hearing on the merits which has een scheduled for early fall, 1974. Plaintiffs are presented by Blanchard, Tucker, Denson & line, P. O. Drawer 30, Raleigh, N.C. 27602.

TITLE I

NEW REMEDY FOR TITLE I VIOLATION SOUGHT

Beaudreau v. Johnston, U.S. Dist. Ct., Cenal District of Calif., Civil Action File No. 3–1264–ED (filed 6/6/73).

Beaudreau v. Johnston is a Title I case being rosecuted in federal court in Los Angeles. It nvolves an aspect of Title I not reached in the *icholson v. Pittenger* litigation [*see, Inequality in ducation* #15, November 1973, pp. 86-87], *i.e.*, arental participation.

This action is predicated on the failure and efusal of the Los Angeles Unified School District, s Superintendent of Schools (Johnston) and its itle I Director to accord to the federally manated Parent Council (in Los Angeles referred to as he Citizens' Compensatory Education Advisory ommittee [CCEAC]) any opportunity to particiation in formulating the district's 1973–74 Title application. Named as defendants along with ocal school officials are the California State epartment of Education, the state schools' uperintendent Wilson Riles and the state's comensatory education director who are charged with nowingly approving a grant application that iled to satisfy federal requirements for Title I onies.

The CCEAC and all target school parent dvisory councils were completely and arrogantly ignored by the school district in the process of drafting the 1973–74 application. Without having informed the CCEAC or any other parents, and prior to development of programs and budgets at individual school sites, district officials constructed an application relegating themselves with sole authority for submitting a Title I proposal. Although they had been informed of this situation, the state education officals approved the programs proposed by Los Angeles.

Remedies. If plaintiffs prevail at trial, the question of remedies will arise. It is plaintiffs' position that the injury has been irrevocably done. It is now impossible to obtain parental involvement in *development* of programs for a school year that will be near its end when trial is completed. Plaintiffs firmly believe that parental influence is of great value to the design of beneficial educational programs and that students have been deprived of that benefit for a full year. Some students will be in non-Title I schools next year, further depriving them of Title I compensatory programs.

What "remedy" can retrieve or compensate for the lost benefits? To attempt to recoup or create for the future what never previously existed, I anticipate asking for imposition of a trust upon a sum of money equal to the amount expended by the school district during 1973–74 on Title I programs.

In other cases, or as an alternative in *Beaudreau*, one might be able successfully to argue for the *Nicholson* remedy (power to "examine and review," combined with authority to modify and even terminate programs), or court-supervised monitoring powers in a citizens' group for specified period of time (whereby the group will be able to obtain quick judicial review of alleged violations with the threat and actual use of the court's contempt powers) or any of a variety of imaginable variations.

The Trust Theory

To impress a trust is predicated on traditional principles of equity and proceeds as follows. The monies granted for Title I have been illegally expended. The illegality consists of the application for and expenditure of the grant by persons who knew beforehand that they had not satisfied the conditions for receipt of such money and had

actively desired to and did foreclose adherence to those conditions, thereby violating rights of others (students and parents).

Fraud, false pretense or maladministration of a trust or other refusal to properly execute a trust is ground in equity for imposition of a trust on an amount equivalent to the trust improperly administered, or on a sum equal to the funds fraudulently acquired. The conditions of defendants in the *Beaudreau* case fits into one or all of such categories of acts sufficient to give rise to a trust. Such trust fund (to be derived from general school district funds or the state's General Fund) *would then have to be expended in an ensuing school year at the schools that qualified for Title I services in the year with respect to which the violations occurred* (after, of course, proper mechanisms for parental involvement have been established and implemented).

Direct and total divestiture of school district administration is the most preferred remedy. If school districts, after being accorded ample opportunity for proper administration of funds entrusted to them, nevertheless have demonstrated inability or unwillingness to administer in compliance with statutory and regulatory requirements, reason impels direct and immediate divestiture of authority over all aspects of Title I grant planning and implementation and transfer of such authority for all purposes to a qualified, independent administering body.[1]

Rather than merely granting "examine and review" powers, this remedy creates an entirely new authority for development and administration of programs, completely severing the school district from all control over Title I operations.

Ernest L. Aubry*

[1] Precedent for such action is not lacking in analogous areas. *E.g.*, the California Supreme Court, after legislative and executive inability to agree upon a constitutionally valid legislative reapportionment plan, ordered the matter placed in the hands of a panel of "masters" and approved as its own the masters' reapportionment scheme. *Legislature v. Reinecke*, (1973) 10 Cal. 3d 396, (1972) 7 Cal. 3d 92, (1972) 6 Cal. 3d 595.

Courts possess broad equitable powers to fashion remedies appropriate to the circumstances. "'Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law . . . would create injustice in the affairs of men.' . . . Equity acts 'in order to meet the requirements of every case, and to satisfy the needs of progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.' . . . Equity need not wait upon precedent 'but will assert itself in those situations where right and justice would be defeated but for its intervention.'" *In the Matter of the Estate of Vargas* (1974), _____ Cal. App. 3d _____, _____ (Calif. Ct. of App., 3d App. Dist.).

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BILINGUAL

QUALITY BILINGUAL EDUCATION THROUGH LAU?

The Supreme Court's decision in *Lau* v. *Nichols*, _____ *U.S.* _____, *94 S. Ct. 786 (1974)* has been widely greeted by advocates of bilingual-bicultural education as a landmark in the effort to secure equal educational opportunity for non-English speaking minority children. However, as indicated in the note on *Lau* in *Inequality in Education*, #16, March 1974 (p.58), the Court's opinion was narrowly drawn. It left unanswered some practical questions which are essential if quality bilingual-bicultural education is to become a reality.

The *Lau* decision rested on section 601 and section 602 of the Civil Rights Act of 1964 and the HEW regulations promulgated under that section. Thus, on the narrowest construction, the decision stands simply for the proposition that the HEW guidelines involved were "entitled to great weight" as the consistent and reasonable interpretation of the department charged with administering Title VI. And while Title VI does provide a weapon for plaintiff-litigants, the limitations on relief through the statute could have been avoided had the Court ruled on the Equal Protection claim.

Administration and interpretation of the Civil Rights Act of 1964 has, from its inception, been subject to the bureaucratic and political winds which blow at HEW. Actual enforcement of Title VI through hearings and cut-offs has been the exception, negotiation seemingly endless. *See*, for instance, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *Lau* v. *Nichols* does make clear at the Supreme Court level that individual plaintiffs may sue to enforce the provisions of Title VI without waiting for HEW to act. On the other hand, to the extent that the definition of discrimination for Title VI purposes is whatever HEW says

is, then one must always be looking over its oulder to make certain that standards are not anging. In view of its strong support for the gulations involved in *Lau* (the United States lvanced the Title VI argument in the Supreme ourt), it seems very unlikely that HEW could or ould backtrack on the position that school stricts must "take affirmative steps to rectify he] language deficiency," 35 Fed. Reg. 11595 970). However, lawyers who seek to apply Title I to new situations, extending the current inter- etations of the regulations, or who desire a iendly court appearance by HEW may be disap- inted by the difficulty of obtaining swift and ogressive decision-making by the agency.

One reading of *Lau* may provide help in ealing with some aspects of this problem. The EW regulations upheld by the Court were of two rieties: broadly worded regulations which ampli- ed the ban on discrimination in the use of federal nds found in Title VI, and an interpretive ideline specifically requiring affirmative steps to rrect language deficiencies of non-English eaking students. The Court first quoted from the ore general language of 45 C.F.R. sec. .3(b)(1), 80.5(b) and 80.3(b)(2). For instance, c. 80.3(b)(1) says that recipients of federal aid ay not "restrict an individual in any way in the joyment of any advantage or privilege enjoyed others receiving any service, financial aid, or her benefit under the program," nor may it tilize criteria or methods of administration ich have the effect of subjecting individuals to scrimination," 80.3(b)(2). The Court concluded at it " . . . seems obvious that the Chinese- eaking minority receives less benefits than the nglish-speaking majority from respondents' hool system which denies them a meaningful portunity to participate in the educational ogram—all earmarks of the discrimination nned by the Regulations." The court then scribes the 1970 HEW guidelines which specifi- lly require affirmative language programs, 35 Fed. g. 11595. The opinion can be read as applying e broad anti-discrimination language of sec. 80.3 directly to the fact situation of a large number non-English speaking children being function- y excluded from educational benefits. On this ding the more specific 1970 clarifying guideline terial would not be essential to the decision and us it may be possible to press claims of discrimination which are as yet uncovered by specific HEW guidelines. Support for this reading can be found in the separate opinion of Mr. Justice Stewart, concurring in the result, who views the 1970 guidelines as central to a finding of discrimination.

Beyond the question of what kinds of discriminatory activity are reached by Title VI lies the harder issue of relief. Title VI prohibits discrimination in federally assisted programs. It does not, of course, require a local school district to participate in these programs. Some districts, particularly small rural districts which have a large number of non-English speaking children and receive a small amount of federal funds, may decide (on cost or ideological grounds) to forego federal funds rather than institute a language program. Since the most likely source of federal money in such districts is the Elementary and Secondary Education Act's Title I or Title I Migrant programs, the effect of a decision to give up federal funding would be to deprive poor children of whatever meager benefits they are already getting from these programs. A second possibility is that such districts will simply rewrite their Title I applications to make correction of language problems a goal of their Title I programs. This would raise the critical and difficult question of the quality of programs required by *Lau*.

In larger districts (such as the San Francisco district), the threat of a loss of federal funds is likely to be a greater inducement for the initiation of programs. Even here one should be careful to argue that poor and minority students are not the only ones to suffer the loss of federal funds when a school district is found to be practicing discrimination in its school program. In *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Court seemed to limit the cut-off power of HEW to specific federal grants infected with prohibited discrimination rather than to all federal funds received by the offending school district. Although the issue of *which* federal funds may be cut-off was never presented in *Lau*, it would seem that the exclusion of non-English speaking children from basic educational benefits must necessarily limit the ability of such children to participate in all phases of public school life in their district. The Fifth Circuit in *Taylor County* did indicate that "[t]o say that a program in a school is free from discrimination

because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position," *supra,* 1079. The burden should be on school districts to show that the discrimination found in one federal program could have no effect on the participation of minority students in other federally assisted programs.

The problem of relief is not confined to the cut-off issue. Hopefully most school districts will comply with *Lau* rather than lose federal funding. The real question is what kinds of language programs will be required under *Lau.* Unfortunately the decision itself is of little help. The Court specifically eschews requiring any particular type of program, stating that "[p]etitioner asks only that the Board of Education be directed to apply its expertise to the problem and rectify the situation." For many minority students the application of such "expertise" will yield programs which have little to do with *quality* bilingual-bicultural education. Since decades of discrimination (including failure to provide language instruction) have resulted in a disproportionately low number of available minority teachers, many districts will not be in a position to institute meaningful programs. Furthermore, unrealistic certification qualifications also operate to exclude potential minority teachers. The result, if districts are to rely on their existing teaching staffs to provide special language programs, may be a giant hoax on non-English speaking children. From the lawyer's perspective, however, that hoax may be virtually unassailable in court.

For example, suppose a district adopts a program entitled "Language Difficulty Correction Program" which centers on a few of its Anglo teachers receiving some extra training at a local teachers' college. Suppose further that the district is able to write a program description in suitable educational jargon and obtain the services of some "educators" who will testify that this is a bona fide program to help non-English speaking children. It is not certain that such a program would fall short of the *Lau* requirements and it is highly likely that most judges will not want to rule on what constitutes the best method of teaching non-English speaking children. Indeed the question of teaching methodology is one which courts have always sought to avoid. Thus advocates of bilingual-bicultural education may want to have a firm idea as to what kinds of programs they can secure from a local district before they move forward and demand relief under *Lau.* (It is possible, of course, that HEW may issue further interpretative guidelines which specifically require teaching of all courses in the child's home language. Interested persons might do well to write the Office for Civil Rights and urge the adoption of strong regulations on this question.)

Finally, *Lau* may provide some direction for other kinds of education cases in its use of state education statutes and policies as relevant to a finding of unequal treatment. The Court reviewed the California statutes which mandated proficiency in English as state policy and concluded that: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Undoubtedly other acts of discrimination may be cast in terms of effective foreclosure from the purposes of the state's education statutes and policies and use of such state materials may be helpful in obtaining relief under Title VI.